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Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

October Term, 1997

ROBIN CLIFTON AND
MAINE RIGHT TO LIFE COMMITTEE, INC.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* ("FECA" or "Act"), provides that a corporation may not make "a contribution or expenditure in connection with a[ ] [federal] election" from its general treasury. 2 U.S.C. § 441b. This Court has specifically held that, in order to satisfy the First Amendment, the term "expenditure" in that statutory provision must be narrowly construed to encompass only communications which "expressly advocate" (*i.e.*, which contain "explicit words of advocacy" of) the election or defeat of a clearly identified candidate. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (*MCFL*); *Buckley v. Valeo*, 424 U.S. 1, 43-44 n.52 and 80 n.108 (1976) (*per curiam*). Nevertheless, in its "voter guide" regulation (11 C.F.R. § 114.4(c)(5)), under the purported authority of 2 U.S.C. § 441b, the Federal Election Commission (FEC) subjects a corporation's disbursements for non-express advocacy communications to significant burdens on the manner in which they must be produced and on their contents. The court below held

QUESTIONS PRESENTED – Continued

inter alia that only corporations which have certain features[1] have a right to engage in *issue advocacy*.

1. Does the FEC have the authority under 2 U.S.C. § 441b (as construed by this Court in *MCFL*) to promulgate regulations which burden a corporation's expenditures for communications containing no "explicit words of advocacy" of the election or defeat of any clearly identified candidate where the corporation is not entitled to the "*MCFL* exemption"?

2. Does the FEC have the authority under 2 U.S.C. § 441b (as construed by this Court in *MCFL*) to promulgate regulations which burden a non-*MCFL* exempt corporation's expenditures for communications which do not contain "explicit words of advocacy" of the election or defeat of a clearly identified candidate on the grounds that such communications "contain" or "convey" an "electioneering message"?

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[1] This Court held in *MCFL* that certain corporations were exempt from a prohibition on "express advocacy." It described the "three features" which entitle a corporation to the "*MCFL* exemption" as follows:

> *First*, [the corporation] was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . *Third*, [it] was not established by a business corporation or a labor union, it is its policy not to accept contributions from such entities.

479 U.S. at 263-264.

RULE 29.1 LISTING

Petitioner Maine Right to Life Committee, Inc. (MRLC) is a nonprofit corporation organized under Maine law. MRLC has neither parent companies nor subsidiaries. Robin Clifton is an individual and not a member of MRLC.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Facts 2

B. Proceedings Below 4

C. Disposition by the Courts Below 5

REASONS FOR GRANTING THE PETITION 5

INTRODUCTION 5

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND IS THEREFORE ERRONEOUS; IN ADDITION, IT CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL CIRCUIT; FINALLY, IT CREATES AN INTRACIRCUIT CONFLICT IN THE FIRST CIRCUIT 14

A. The Decision Of The Court Of Appeals Directly Conflicts With This Court's Decision in *MCFL*; Therefore, It Is Clearly Erroneous 14

1. The court of appeals' decision is erroneous because it held that corporations do not have the right to make issue advocacy expenditures unless they satisfy the "*MCFL* exemption." 14

TABLE OF CONTENTS – Continued

Page

2. The court of appeals' holding that the "electioneering message" prohibitions do not violate corporations' rights to make issue advocacy expenditures conflicts with *MCFL* and is clearly erroneous 21

3. Two holdings of the court below conflict with this court's precedents and therefore are erroneous 23

B. The Decision Of The Court of Appeals Directly Conflicts With The Decision Of Another Federal Circuit 24

C. The Decision of The Court of Appeals Directly Conflicts With Two Prior Decisions Of That Court And Therefore Will Result In Serious Confusion Within The First Circuit 25

II. THIS CASE PRESENTS IMPORTANT ISSUES OF LAW 26

A. The FEC's Regulation Affects the Speech of Countless Organizations, and the Speech Affected Is Entitled to the Highest Degree of First Amendment Protection 26

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 19, 20

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Clifton v. Federal Election Commission, 927 F. Supp. 493 (D.Me. 1996), *modified*, 114 F.3d 1309 (1st Cir. 1997) ..... *passim*

Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir.) (1st Cir.), *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991) 4, 8, 9, 25

Federal Election Commission v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979) 8, 9

Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) 8, 9

Federal Election Commission v. Christian Action Network, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd per curiam in unpublished opinion*, 92 F.3d 1178 (4th Cir. 1996) 7, 9, 24

Federal Election Commission v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997).... 7, 8, 9, 24, 25, 29

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 839 F. Supp. 1448 (D.Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded* 116 S.Ct. 2309 (1996) ... 7, 9

Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir.), *cert. denied* 484 U.S. 850 (1987) 9

TABLE OF AUTHORITIES – Continued

Page

Federal Election Commission v. GOPAC, 871 F. Supp. 1466 (D.D.C. 1994) 9

Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981) 9

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

Federal Election Commission v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989) 8, 9

Federal Election Commission v. Phillips Publishing, 517 F. Supp. 1308 (D.D.C 1981) 9

Federal Election Commission v. Survival Education Fund, Inc., No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.), *aff'd in part and rev'd in part on alternate grounds*, 65 F.3d 285 (2nd Cir. 1995) 7, 9

Maine Right to Life Committee v. Federal Election Commission, 914 F. Supp. 8, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 66 U.S.L.W. 3254 (1997) 7, 9, 26, 28, 29

Mills v. Alabama, 384 U.S. 214 (1966) 27

New York Times v. Sullivan, 376 U.S. 254 (1964) 26

Stromberg v. California, 283 U.S. 359 (1931) 27

Whitney v. California, 274 U.S. 357 (1927) 26

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. Amend. I 1, 5, 6, 17, 26, 29

Administrative Procedure Act, 5 U.S.C. § 706 .. 2, 4, 11

TABLE OF AUTHORITIES – Continued

Page

Equal Access to Justice Act, 28 U.S.C. § 2412 ....24, 25

Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* .....i, 24, 26

2 U.S.C. § 441b ..... *passim*

28 U.S.C. § 1254(1) 1

11 C.F.R.:

Section 100.22(b) 9

Section 114.4(b)(5) 9

Section 114.4(c)(4) 2, 4, 11, 12

Section 114.4(c)(5) .....i, 2, 4, 10, 12, 20

OTHER AUTHORITIES

James Bopp, Jr. and Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West. L. A. L. Rev. 1 (1997) 8

Fair Government Foundation, *The FEC's Express War on Free Speech* (1996) 8

Larry J. Sabato and Glenn R. Simpson, *Dirty Little Secrets: The Persistence of Corruption in American Politics* 29

Robert L. Stern, *Supreme Court Practice* (1993) 25

60 Fed. Reg. 64,260, 64,262 (1995) 10

PETITION FOR A WRIT OF CERTIORARI

Robin Clifton and Maine Right to Life Committee, Inc. (MRLC) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 114 F.3d 1309 and reproduced in the Appendices (App.) hereto. App. 1. The opinion of the district court is reported at 927 F. Supp. 493. App. 60.

JURISDICTION

The court of appeals entered its judgment on June 6, 1997. App. 84. Petitioners Clifton and MRLC[2] timely filed a petition for rehearing, which was denied on June 27, 1997. App. 85. Respondent FEC timely filed a petition for rehearing and a suggestion for rehearing *en banc*, which were denied on August 8, 1997. App. 86. On October 29, 1997, Justice Souter extended the time for filing a Petition for Writ of Certiorari to and including December 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

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[2] Hereinafter collectively referred to as "MRLC" unless the context clearly indicates otherwise.

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The provisions of 2 U.S.C. § 441b(a), 5 U.S.C. § 706, 11 C.F.R. § 114.4(c)(4) and 11 C.F.R. 114.4(c)(5) are set forth in the appendices. App. 88-91.

STATEMENT OF THE CASE

A. Facts.

MRLC is a statewide, nonprofit, membership corporation which makes disbursements for political speech in order to promote the pro-life position on issues such as abortion and euthanasia. MRLC is exempt from taxation under the Internal Revenue Code and is not associated with any candidate, campaign committee or political party. Stipulation of Facts (App. 92 *et seq.*). MRLC accepts a small amount of donations from business corporations into its general fund and intends to continue to do so. App. 93.

MRLC's purposes are to educate the public on issues relating to abortion, to restore protection of the right to life for unborn children and to promote the sanctity of all innocent life. *Id.*

Robin Clifton, MRLC's co-plaintiff, is an adult citizen of the United States residing in Maine. She receives and reads MRLC's voter guides and voting records although she is not a member of MRLC. Verified Complaint (V.C.) ¶ 7.

The Federal Election Commission is an agency of the United States of America which is charged with enforcement of the FECA. V.C. ¶ 8.

Prior to federal elections, MRLC publishes and distributes to the general public "voter guides" which describe the positions of candidates for federal office on

pro-life issues. These voter guides are paid for out of MRLC's general treasury. The information contained in such voter guides concerning the candidates' positions on issues is gathered primarily by means of written questionnaires. However, if a candidate does not respond to MRLC's candidate survey in writing or if a clarification of the candidate's position is needed, MRLC may contact the candidate orally in order to get such response or clarification. V.C. ¶¶ 12, 13. In the future, if one or more candidates fail to respond timely to MRLC's questionnaire, or if MRLC needs clarification of responses, MRLC intends to contact such candidates in order to acquire the necessary information. V.C. ¶ 20.

MRLC does not necessarily give all candidates for a particular federal office an opportunity to respond to its surveys; nor is every candidate for a given federal office necessarily represented in a published voter guide. In the past, candidates have been excluded from consideration. V.C. ¶ 15.

In the past, MRLC's voter guides have not expressly advocated the election or defeat of any clearly identified candidate. However, candidates are not necessarily given an equal amount of space in MRLC's voter guides. One candidate may receive greater prominence or substantially more space for responses than another candidate. V.C. ¶ 16.

In past voter guides, MRLC has used the word "yes" or the letter "y" in a voter guide in order to indicate that a candidate's response to a question on a particular issue is in agreement with the National Right to Life Committee's position on that question. V.C. ¶ 22.

FECA prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any [federal] election" from its general treasury. 2 U.S.C. § 441b(a).

B. Proceedings Below.

MRLC commenced this action in the district court in order to challenge the validity of two regulations (11 C.F.R. §§ 114.4(c)(4) and 114.4(c)(5)) newly-promulgated by the FEC. App. 90-91. The regulations, which became effective on March 13, 1996, provided for restrictions on the manner in which corporations must publish "voting records" and "voter guides." The FEC has stated that the statutory authority for its regulations is in the prohibition of corporate contributions and expenditures contained in § 441b. App. 89.

MRLC brought this suit as a pre-enforcement facial challenge to the regulations. The case was submitted to the district court on a stipulated record. App. 61. MRLC's principal claim was that the voter guide and voting record regulations[3] were beyond the statutory authority of the FEC under the Administrative Procedure Act, 5 U.S.C. § 706, because they burden corporate issue advocacy. App. 66. MRLC's claim was based upon this Court's holding in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (*MCFL*) and the First Circuit's decision in *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991) (*Faucher*) which had narrowly construed 2 U.S.C.

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[3] Unless the context clearly indicates otherwise, references to the "voter guide regulation" should be understood to include both the "voter guide" and the "voting record" regulations.

§ 441b to apply only to expenditures for "express advocacy."

C. Disposition by the Courts Below.

The district court held that the regulations were invalid under 2 U.S.C. § 441b on the grounds urged by MRLC. App. 78. The court of appeals "modified" the judgment of the district court. It held that the "voting record regulation . . . is declared invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates. . . . " App. 18. The court held that "the voter guide regulation . . . is declared invalid only insofar as it limits any contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction." App. 18-19. Finally, the court below remanded the question of the "validity of the 'electioneering message' provisions" of the voter guide regulation "for further proceedings in accordance with [its] opinion." App. 19. Each party timely petitioned the court for rehearing and each party's petition was denied. App. 85-86.[4]

REASONS FOR GRANTING THE PETITION

INTRODUCTION

This Court has held without equivocation that campaign-related "expenditures" from a corporation's general treasury fund are protected against governmental infringement under the First Amendment unless they

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[4] The district court held a telephonic hearing on September 25, 1997 at which counsel for both parties suggested that further proceedings should be stayed pending the ultimate disposition of the case by this Court. The district court entered an oral order granting the requested stay.

constitute "express advocacy" of the election or defeat of a clearly identified candidate. *MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. 1, 43-44 n.52 and 80 n.108. This rule is known as the "express advocacy test." It is a very narrow exception to the overarching principle that political speech is immune from governmental restriction.[5] The "express advocacy test" distinguishes between "issue advocacy" (a broad category of speech as to which this Court has never allowed any restriction) and "express advocacy" (a very narrow category of speech as to which this Court has allowed *only* restrictions which are narrowly tailored to serve compelling governmental interests).[6]

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[5] As this Court explained in *Buckley*:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. *The First Amendment affords the broadest protection to such political expression.* . . .

Buckley, 424 U.S. at 14 (emphasis added).

[6] "Issue advocacy" is a term of art in the field of election law. It is the opposite of "express advocacy," a term coined by this Court in *MCFL* in order to denote *Buckley's* rule that only speech containing "explicit words of advocacy" of election or defeat of a clearly identified candidate may be infringed. 424 U.S. at 43-44. This Court has never sanctioned governmental infringement of issue advocacy. Moreover, although this Court has permitted limitations on "express advocacy," it has done so only where those restrictions are narrowly tailored to serve a compelling governmental interest. For example, in *Buckley*, this Court struck down "the Act's independent expenditure ceiling . . . , its limitations on a candidate's expenditures from his own personal funds . . . , and its ceilings on overall campaign expenditures. . . . " 424 U.S. at 58. Each of the invalidated provisions contained a limitation on "express advocacy"; each was held unconstitutional because it was not supported by a

The narrow "express advocacy test" follows ineluctably from this Court's historic concern for political speech. This Court has ardently protected political speech (and especially issue advocacy) because of its pivotal role in our representative form of government. As the Court has long recognized, if issue advocacy may be infringed, then the foundation of democracy itself is imperiled. For,

> [i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation.

Buckley, 424 U.S. at 14-15.

In order effectively to serve the purpose of protecting representative government, the term "express advocacy" has been strictly defined to include only speech which consists of "explicit words of advocacy" of the election or defeat of a clearly identified candidate. *Id.* at 43-44.[7] This

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compelling governmental interest. *See, generally*, 424 U.S. at 39-58.

[7] Because the lower federal courts have understood *Buckley's* teaching, there are numerous cases holding that the term "express advocacy" test must be strictly interpreted. *See, e.g., Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd per curiam*, 92 F. 3d 1178 (4th Cir. 1996); *Maine Right to Life Committee v. Federal Election Commission*, 914 F. Supp. 8, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 66 U.S.L.W. 3254 (1997); *Federal Election Commission v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.), *aff'd in part and rev'd in part on alternate grounds*, 65 F.3d 285 (2nd Cir. 1995); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,

extremely narrow definition of the term is required by its rationale. To define it more broadly would eviscerate protection of issue-oriented political speech in the context of campaigns and elections. The Fourth Circuit recently explained that this Court "adopted the bright-line limitation that it did in *Buckley* in order to protect our cherished right to political speech free from government censorship." *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049, 1051 (4th Cir. 1997) (*CAN II*). The Court might have drawn "a different line" but that "would have come at the cost of expanded regulatory authority in a sphere where government regulation- . . . must be viewed with the utmost suspicion. . . . " *Id.* at 1052.

Despite this Court's specificity and clarity as to what is meant by "express advocacy," the FEC has pursued a strategy of trying to expand the definition of that term beyond "explicit words of advocacy."[8] The FEC has

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839 F. Supp. 1448 (D.Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996); *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) and *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979).

[8] This strategy has been chronicled in James Bopp, Jr. and Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West. L. A. L. Rev. 1, 19-20 (1997) and in Fair Government Foundation, *The FEC's Express War on Free Speech* (1996).

attempted to do so both through unsuccessful enforcement actions[9] and through invalidated regulatory efforts.[10] The regulation under consideration here is yet another FEC attempt to regulate issue advocacy.[11] Indeed, the FEC conceded in the courts below and in the explanation of its rulemaking that its voter guide regulation seeks to restrict not only "express advocacy," but also issue advocacy. App. 4-5, 67 and 79.

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[9] *See, e.g., Federal Election Commission v. American Federation of State, County and Municipal Employees,* 471 F. Supp. 315 (D.D.C. 1979); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980); *Federal Election Commission v. Machinists Non-Partisan Political League,* 655 F.2d 380 (D.C. Cir. 1981); *Federal Election Commission v. Phillips Publishing,* 517 F. Supp. 1308 (D.D.C. 1981); *Federal Election Commission v. Massachusetts Citizens for Life,* 107 S. Ct. 616 (1986); *Federal Election Commission v. National Organization for Women,* 713 F. Supp. 428 (D.D.C. 1989); *Federal Election Commission v. Survival Education Fund,* 65 F.3d 285 (2nd Cir. 1995); *Federal Election Commission v. Christian Action Network,* 894 F. Supp. 946 (W.D.Va. 1995), *aff'd,* 92 F.3d 1178 (4th Cir. 1996); *Federal Election Commission v. GOPAC,* 871 F. Supp. 1466 (D.D.C. 1994); *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* ___ U.S. ___, 116 S. Ct. 2309 (1996).

[10] *See, e.g.,* 11 C.F.R. § 114.4(b)(5), invalidated in *Faucher v. FEC,* 928 F.2d 468 (1st Cir. 1991); 11 C.F.R. § 100.22(b), invalidated in *Maine Right to Life Committee v. Federal Election Commission, supra,* n.7.

[11] The FEC has been unsuccessful in all of its previous attempts to increase the scope of "express advocacy" except in the case of *Federal Election Commission v. Furgatch,* 807 F.2d 857 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987). However, as the Fourth Circuit recently explained in *CAN II, supra,* even *Furgatch* (which the FEC has since used to support its broad interpretation) arguably represents a narrow reading of "express advocacy." *CAN II,* 110 F.3d at 1054-55.

The FEC finds justification for its attempt to regulate issue advocacy in a novel legal theory. In its view, the disbursements regulated by its voter guide regulation are "contributions" to candidates, not "expenditures." *Id.* The FEC claims that mere "contact" between a corporation and a candidate regarding the preparation of a voter guide transforms an expenditure by the corporation into an "in-kind contribution" to the candidate. The FEC contends, moreover, that "contributions" are not entitled to the same degree of First Amendment protection as "expenditures" because the *MCFL* Court did not specifically apply the "express advocacy" limitation to "contributions." Therefore, the FEC asserts that, despite its regulation of "issue advocacy," the voter guide regulation is a valid exercise of the agency's power to regulate corporate "contributions" under 2 U.S.C. § 441b. In short, the FEC argued that disbursements for *issue advocacy* communications may be limited if they can be characterized as "contributions."[12]

The new voter guide regulation at 11 C.F.R. § 114.4(c)(5) (App. 90-91) provides that corporations must produce their voter guides in one of two mutually exclusive ways. They must either (1) produce them without resorting to any contact whatsoever with the candidates;

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[12] The FEC states in its "Explanation and Justification" for the voter guide regulation that "payments which are coordinated with candidates constitute expenditures and in-kind contributions to those candidates *even if the communications do not contain express advocacy.*" 60 Fed. Reg. 64,260, 64,262 (1995) (emphasis added). As the district court noted, "at oral argument, the FEC's counsel asserted that the new regulations are defended only on the ground that the activity in question can properly be interpreted as a contribution, not an expenditure." App. 67.

or (2) engage only in written contact with the candidate and comply with other limitations. These include: (a) giving every candidate for a particular office "an equal opportunity to respond"; (b) giving every candidate the same amount of "prominence" and "space" in the guide; and (c) refraining from conveying an "electioneering message," either by "scoring or rating the candidates' responses" or in some other manner. *Id.* The "voting record" portion of the regulation provided *inter alia* that the "decision on content . . . of voting records shall not be coordinated with any candidate." 11 C.F.R. § 114.4(c)(4) (App. 90).

MRLC challenged the voter guide regulation under the Administrative Procedure Act, 5 U.S.C. § 706. App. 88. The challenge was principally based upon the claim that the regulation was beyond the statutory authority of the FEC under 2 U.S.C. § 441b as that statute had been constitutionally construed by this Court in *MCFL*. MRLC claimed, in short, that the regulation impermissibly burdened "issue advocacy" expenditures by corporations.[13] The district court agreed with MRLC's characterization: it

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[13] The gravamen of MRLC's claim was that the regulation was "overbroad" in the sense that it burdens more speech than is permissible under § 441b as it had been narrowed by this Court in *MCFL*. This claim was directed at the regulation in its entirety. V.C. ¶¶ 53-65 and 87-90. Thus, included within its "overbreadth" attacks was an implicit claim that the "electioneering message" provisions prohibit more speech than § 441b (under *MCFL*) permits. In the alternative, MRLC made a claim that the "electioneering message" provisions are "vague," that is, they do not provide adequate notice of what they purport to prohibit. Because the district court found that the entire voter guide regulation was overbroad, it did not reach the question of vagueness. App. 77.

held that the "regulations found at 11 C.F.R. § 114.4(c)(4) & (5) are invalid" under the FECA as interpreted by this Court in *MCFL* "because they restrict issue advocacy in connection with expenditures." App. 78. The district court correctly analyzed and decided this case under this Court's "express advocacy" jurisprudence. Recognizing that *MCFL* (by incorporating *Buckley's* "express advocacy" test into § 441b) and the First Circuit case of *Faucher v. FEC* (applying *MCFL*) had held that only expenditures for "express advocacy" could be limited under § 441b, the district court held that "spending on issue advocacy – the only form of advocacy the Maine Right to Life Committee proposes to engage in here – cannot be limited." App. 68.

However, based upon a profound misunderstanding of this Court's holdings in *MCFL*, the court of appeals jettisoned the correct (*i.e.*, "express advocacy") analysis from the district court's opinion and "modified" the holding of the district court. Rather than affirm the district court's holding that the regulation impermissibly impinged on issue advocacy, it declared that it was "invalid only insofar as it limits any contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction."[14] App. 18-19. The court of appeals then remanded to the district court the question of "[t]he validity of the 'electioneering message' provisions" of the regulation "for further proceedings in accordance with this opinion." App. 19. Specifically, the court of appeals instructed the district

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[14] The court of appeals also cut back on the holding of the district court with respect to the "voting record" portion of the regulation. "[T]he voting record regulation is declared invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates. . . . " App. 18.

court to consider MRLC's (alternative) claim regarding whether the "electioneering message" portions of the regulation are unconstitutionally "vague." *Id.*[15]

The crux of the court of appeals' reasoning was its misunderstanding of *MCFL*. The court incorrectly believed that *MCFL* protected the *issue advocacy* of *only* those corporations which were entitled to the *"MCFL* exemption." Since MRLC had pled that it accepted donations from business corporations (presumably in contravention of the third *MCFL* factor), the court of appeals believed that MRLC was not entitled to engage in *issue advocacy*. The court, therefore, rested its decision concerning the regulation on different grounds than the "express advocacy" test (which had formed the basis of the district court's analysis).

Thus, the court of appeals' crucial holding is that a corporation does not have a right to make "expenditures"[16] for "issue advocacy" unless it satisfies the three prongs of the *"MCFL* exemption." This holding directly

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[15] In addition, the district court was instructed to decide the question whether the "electioneering message" provisions were severable from the voter guide regulation. App. 18.

[16] Significantly, the court below rejected the FEC's "contribution" theory, stating that "[t]he claim that noncomplying publications are . . . contributions is untenable." App. 5. Noting that the *Buckley* Court "has said . . . that expenditures directed by or 'coordinated' with the candidate could be treated as contributions," the court stated that " 'coordination' in this context implied some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue." *Id.* The court below thus based its reasoning on the premise that the FEC's voter guide regulation must be regarded as limiting "expenditures" rather than "contributions."

conflicts with the *MCFL* Court's holding that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249.

Included under the broad holding that corporations do not have a right to make issue advocacy expenditures unless they satisfy the *MCFL* exemption, is the narrower holding that non-exempt corporations do not have a right to make expenditures which contain "electioneering messages." For, as the court below recognized, "electioneering message" encompasses more than "express advocacy." App. 17. Therefore, a prohibition on "electioneering messages" in corporate voter guides violates *MCFL*'s holding that only express advocacy expenditures are subject to limitation under 2 U.S.C. § 441b.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND IS THEREFORE ERRONEOUS; IN ADDITION, IT CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL CIRCUIT; FINALLY, IT CREATES AN INTRACIRCUIT CONFLICT IN THE FIRST CIRCUIT.

A. The Decision Of The Court Of Appeals Directly Conflicts With This Court's Decision in *MCFL*; Therefore, It Is Clearly Erroneous.

1. The court of appeals' decision is erroneous because it held that corporations do not have the right to make issue advocacy expenditures unless they satisfy the *"MCFL* exemption."

The court below held that a corporation's right to make expenditures for "issue advocacy" out of its general

treasury depended upon whether the corporation possessed certain features regarding the nature of its business activities, its relationship to shareholders and its acceptance of donations from business corporations.[17] Under the court of appeals' holding, some corporations have the right to engage in issue advocacy while others do not. That holding is directly contrary to this Court's holding in *MCFL*. For, in that case, this Court held that Congress may not prohibit *any* corporation from using its general treasury funds to make "expenditures" for "issue advocacy." *Id.* 479 U.S. at 249.

MCFL was an enforcement action under the FECA against Massachusetts Citizens for Life (MCFL) a corporation which engaged in political speech in support of the pro-life position. The FEC contended that MCFL had violated *inter alia* the prohibition on corporate "expenditures" in 2 U.S.C. § 441b(a) by publishing a "Special Edition" of its newsletter with funds from its general treasury and distributing the publication to the general public. In this Court, MCFL countered the FEC's claim by contending that, under the rationale of *Buckley*,[18] 2 U.S.C.

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[17] *See* n.1, *supra*, for recitation of the *MCFL* features.

[18] The *Buckley* Court had narrowly construed a disclosure provision of the FECA to apply only to "express advocacy." The Court stated:

> To ensure that the reach of [the provision] is not impermissibly broad, we construe "expenditure" . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

424 U.S. at 80. Earlier in the opinion, the *Buckley* Court had explained the narrow scope of the "express advocacy test" as follows:

> [t]his construction would restrict the application of [the provision at issue] to communications containing

§ 441b must be narrowly construed to encompass only disbursements for communications which "expressly advocate" the election or defeat of a clearly identified candidate. This Court agreed, "hold[ing] that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. Thus, the "express advocacy" test, which had been developed in *Buckley* was specifically applied to § 441b in *MCFL*.

That determination, however, did not end this Court's analysis in *MCFL*. The Court examined the "Special Edition" and held that it did indeed contain "express advocacy" of the election of certain clearly identified federal candidates. However, the Court further held that *even as narrowly construed*, the corporate expenditure prohibition of § 441b could not be constitutionally *applied* to MCFL. That is, even though the publication in dispute was "express advocacy," MCFL nonetheless had the right to publish it with funds from its corporate treasury. This followed from the fact that MCFL was not the kind of corporation which threatened to corrupt the "integrity of the marketplace of ideas" through "the influence of political war chests funneled through the corporate form." 479 U.S. at 257. In order to distinguish corporations which do not threaten the integrity of the political process from those that do, this Court developed a three-part test (now known as the "*MCFL* exemption"). A corporation which

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> *express words of advocacy of election of defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."*

Id. at 43-44 n.52 (emphasis added).

shares these three features, is exempt from § 441b's prohibition on corporate expenditures. Thus, such a corporation may freely engage in *express advocacy* as well as *issue advocacy*.

In sum, *MCFL* had two holdings regarding corporations' right to make disbursements for political speech. In the first, the "express advocacy" test of *Buckley* was applied to corporate expenditures prohibited under § 441b. This holding made clear that corporate expenditures for *issue advocacy* could not be prohibited. In the second holding, this Court developed the "*MCFL* exemption." That holding extended First Amendment protection to corporate expenditures for *express advocacy* as long as the corporation possessed three features which demonstrated its lack of potential to corrupt the political system. Although the two holdings are related insofar as they are both integral to the *MCFL* Court's overall analysis, they are separate and distinct: they protect different categories of First Amendment speech for different reasons.

Despite the fact that this Court's application of the "express advocacy" test to § 441b and its development of the "*MCFL* exemption" constitute distinct legal rules relating to distinct legal rights, the court of appeals thoroughly confounded them. The court of appeals misread *MCFL* as extending corporations' right to make expenditures for *issue advocacy* only to those which satisfied the three-part "*MCFL* exemption." It stated:

> [i]n *Massachusetts Citizens*, the Supreme Court not only narrowed section 441b by construction **but also recognized a First Amendment right to *issue advocacy***, on behalf of a non-profit corporation fairly similar to the Maine Committee,

> that extends to the publication of voter guides. 479 U.S. at 263, 107 S.Ct. at 630-31.
>
> The difficulty is that in that same case, **the Supreme Court stressed as "essential" the fact that the anti-abortion group there involved did not accept contributions from business corporations or unions**. *Id.* at 264, 107 S.Ct. at 631.

114 F.3d 1312 (emphasis added).

As the quoted passage demonstrates, the court below was under the misconception that a corporation's right to engage in *issue advocacy* depended upon its entitlement to the "*MCFL* exemption." On the contrary, as shown above, a corporation's right to make expenditures for *issue advocacy* under *MCFL* is unrestricted: it is not required to have any particular features. The portion of the *MCFL* opinion which concerns the protection of corporate *issue advocacy* (*see* 479 U.S. at 248-249) is not limited to any particular type of corporation. Its sum and substance is that *no* corporate expenditures for issue advocacy may be prohibited. The fact which this Court stressed as "essential" (*i.e.*, that MCFL did not accept contributions from business corporations) was essential only to the subsequent holding concerning the corporation's right to engage in *express advocacy*. In short, this Court held that (1) *all* corporations have the right to make expenditures for *issue advocacy* and (2) that *some* corporations – those with the three *MCFL*-features – have the additional right to make expenditures for *express advocacy*. The first is a broad legal rule which applies to all corporations; the second is a fact-based inquiry which is directed to a particular corporation.

Directly contrary to *MCFL*, the court below held that corporations do not have a right to make expenditures for issue advocacy unless they fulfill the three-part test for

the *MCFL* exemption. Thus, the court of appeals refused to affirm the district court's complete invalidation of the FEC's regulation.

The court of appeals also signalled its misunderstanding of *MCFL* by its treatment of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a case in which this Court further refined the parameters of the "*MCFL* exemption." Significantly, the court described this Court's decision in *Austin v. Michigan Chamber of Commerce*, as upholding "a state statute that barred campaign-related *issue advocacy*, by a nonprofit entity funded by business corporations." App. 7-8. But *Austin* patently did not concern *issue advocacy*; rather, it concerned the right of a nonprofit corporation to engage in *express advocacy*. Analytically, *Austin* was an application of the "*MCFL* exemption" to a corporation with features different from those of MCFL. 494 U.S. at 663-64. The issue in *Austin* was whether Michigan Chamber of Commerce was entitled to engage in "express advocacy" under the "*MCFL* exemption." *Id.* This Court held that it was not so entitled because it did not share any of the *MCFL* features. *Id.*

The court below incorrectly analyzed this case as presenting a choice between *MCFL* (a corporation permitted to make express advocacy expenditures from its general fund) and *Austin* (a corporation *not* entitled to engage in express advocacy). MRLC, the court observed, "does accept contributions from other corporations." App. 8. Therefore, it "falls somewhere between the entity protected in *Massachusetts Citizens* and that held unprotected in *Austin*." *Id.* In effect, the court of appeals believed that if, as a factual matter, MRLC was more like Massachusetts Citizens for Life than it was like the Michigan Chamber of Commerce, then it would be entitled to

make expenditures for *issue advocacy*. Based on the fact that MRLC pled that it received a small amount of contributions from business corporations, the court of appeals denied MRLC's right to make expenditures for issue advocacy, explaining that "[i]t is unclear what the Supreme Court would say about the existence or extent of a constitutional right to campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee." App. 8. It concluded that "under *Austin* Congress could constitutionally prohibit business corporations from engaging in these activities except through segregated funds. . . . " App. 15.

The court of appeals' holding that corporations which do not possess the three *MCFL* factors may have their issue advocacy restricted, was pivotal to the court's ultimate resolution of the case. Because the court apparently did not believe that it could resolve the question whether MRLC was entitled to make *issue advocacy* expenditures (because it did not fit all three parts of the "*MCFL* exemption"), the court decided the case on other grounds, stating "[w]e think the present case can be decided on grounds that do not require us to decide whether *Austin* applies to the Maine Committee, an issue only the Supreme Court can resolve definitively." App. 9. Therefore, the court abandoned the issue advocacy/express advocacy analysis and invalidated two aspects of the voter guide regulation on alternate constitutional grounds.[19]

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[19] The court invalidated the 'equal space and prominence' rule of 11 C.F.R. § 114.4(c)(5) because the government cannot compel "a private entity to express particular views" or require "it to provide 'balance' or equal space or an opportunity to

2. The court of appeals' holding that the "electioneering message" prohibitions do not violate corporations' rights to make issue advocacy expenditures conflicts with *MCFL* and is clearly erroneous.

The court of appeals cut back severely on the First Amendment protection afforded by the district court's decision. MRLC had challenged the entire regulation for "overbreadth." V.C. ¶¶ 53-65 and 87-90. The district court agreed, holding that the regulation was invalid in its entirety for encompassing more than "express advocacy." App. 78. The court of appeals, however, left two burdensome provisions intact: the requirements that voter guides published after (written) contact with a candidate not "contain" or "score or rate the candidate's responses so as to convey" an "electioneering message." The court of appeals remanded to the district court the question whether the "electioneering message" provisions of the voter guide regulation are "vague." App. 19. Further, the court suggested that the "electioneering message" prohibitions might be severable from the rest of the regulation and, therefore, be susceptible of enforcement apart from the invalidated parts of the regulation. App. 18. Thus, after the court of appeals ruling, such provisions remain enforceable against corporations such as MRLC which wish to make expenditures for issue advocacy.

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appear." App. 11. The limitation on oral contact with candidates was held invalid because "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." App. 12.

However, the "electioneering message" provisions of the regulation which the court below left intact are invalid on the basis of overbreadth. Like the other burdens contained in the voter guide regulation, they severely burden issue advocacy. Indeed, they constitute outright prohibitions of corporate speech not amounting to issue advocacy. Therefore, they are beyond the authority of the FEC under § 441b as construed by this Court in *MCFL*. Thus, the court of appeals decision leaving them intact is directly contrary to *MCFL*.

If the court of appeals had properly analyzed this case (*i.e.*, under the "express advocacy" test as applied to corporate expenditures in *MCFL*), it would have invalidated the regulation in its entirety, including the "electioneering message" provisions on the ground that they were overbroad. Indeed, in its discussion of those provisions, the court as much as conceded that they were "overbroad" (*i.e.* that they prohibited *issue advocacy*):

> The FEC might have argued that "electioneering message" is simply another version of the ban on express advocacy upheld by the Supreme Court. But the FEC has conspicuously declined to make that argument. Nor is it clear why, if the FEC meant the phrase to be limited to express advocacy, it did not simply use those words, which are used in a different provision of the same regulation. We are therefore entitled to assume *that "electioneering message" has a different, **broader** meaning.*

App. 17 (emphasis added). Thus, while clearly recognizing that the "electioneering message" provisions reached beyond "express advocacy" to restrict issue advocacy, the court of appeals nevertheless permitted them to stand as against MRLC's "express advocacy" challenge.

Moreover, the court of appeals signalled its belief that the "electioneering message ban, if valid, can stand on its own two feet." App. 18. Significantly, the only doubt the court entertained as to the validity of the electioneering message ban concerned its potential vagueness, not its overbreadth.[20] Thus, the result of the court's opinion is that (1) the electioneering messages ban is not invalid due to overbreadth (for, in the court's view issue advocacy of non-*MCFL* corporations is fair game for FEC restriction, and the court even stated that the ban had a broader meaning than "express advocacy"); and (2) the electioneering message ban could constitute a free-standing prohibition (if it survives MRLC's vagueness challenge). This holding is directly contrary to *MCFL* in its incorporation of *Buckley's* express advocacy test against attempts to restrict corporate issue advocacy.

3. Two holdings of the court below conflict with this court's precedents and therefore are erroneous.

In sum, the court of appeals fashioned two holdings which should be reviewed because they are erroneous and because they directly conflict with this Court's precedents: (1) corporate issue advocacy out of general treasury funds is protected only if the corporation has the three *MCFL* factors, and (2) the "electioneering message"

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[20] The court of appeals remanded consideration of the "electioneering message" provisions not on the question of whether they were "overbroad" (*i.e.*, prohibited more speech than allowed under the precedents) but only on the question of whether they were "vague" (*i.e.*, failed to provide sufficient notice of what they prohibited). App. 16-18.

prohibition is valid despite the fact that it encompasses issue advocacy by corporations.

B. The Decision Of The Court of Appeals Directly Conflicts With The Decision Of Another Federal Circuit.

The holding of the court of appeals in this case directly conflicts with the holding of the Fourth Circuit in *CAN II, supra*. *CAN II* concerned the Christian Action Network's (CAN) request for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), after it had successfully defended an enforcement action under the FECA. In the underlying litigation, the FEC had sued CAN, alleging *inter alia* a violation of 2 U.S.C. § 441b. The lawsuit was based on CAN's expenditure of corporate funds for a television commercial and two print advertisements during the 1992 presidential election. The district court granted CAN's motion to dismiss, basing its dismissal on the narrow construction of the corporate expenditure prohibition in *MCFL*. The district court stated that "before an expenditure is subject to the prohibition of § 441b, it must be found to 'expressly advocate' the election or defeat of a 'clearly identified' federal candidate." *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946, 950 (W.D.Va. 1995) (*CAN I*). The court found that CAN's "advertisements do not constitute express advocacy and are not subject to regulation under FECA." *Id.* at 959. The district court's dismissal was affirmed in an unpublished opinion. 92 F.3d 1178 (4th Cir. 1996).

Subsequently, CAN sought attorney's fees under the EAJA. The ultimate issue before the Fourth Circuit was

whether the FEC's position in the litigation was "substantially justified" under EAJA. The *CAN II* court held that the FEC's position was not substantially justified because "it was foreclosed by clear, well-established Supreme Court caselaw," specifically this Court's holding

> that corporate expenditures for political communications violate 2 U.S.C. § 441b(a) only if the communications employ 'explicit words,' 'express words,' or 'language' advocating the election or defeat of a specifically identified candidate for public office.

110 F.3d at 1050. This holding directly conflicts with the holding of the First Circuit in the instant case that corporations must be entitled to the *"MCFL* exemption" in order to be entitled to engage in unrestricted issue advocacy. Thus, the decision of the court below conflicts not only with this Court's precedents, but also with those of another federal circuit.

C. The Decision of The Court of Appeals Directly Conflicts With Two Prior Decisions Of That Court And Therefore Will Result In Serious Confusion Within The First Circuit.

The decision of the court below conflicts with two earlier decisions of panels of that court.[21] *Faucher v. Federal Election Commission, supra,* involved a challenge by Petitioner MRLC to a previous FEC "voter guide" regulation. The court was presented with the issue of whether

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[21] MRLC is mindful that an intracircuit conflict is not, in and of itself, a sufficient reason for a grant of *certiorari.* But "when the intracircuit conflict relates to a recurring and important issue . . . it may become one of the factors inducing the Court to grant certiorari." Robert L. Stern *et al., Supreme Court Practice* 176 (1993).

"the FEC has the authority, under section 441b(a), to restrict issue advocacy or whether the FEC may only restrict express advocacy." 928 F.2d at 468. The court held that only express advocacy may be restricted. It based its holding on the fact that "*Buckley* and *Massachusetts Citizens for Life* ensured [the right "to engage in issue-oriented political speech"] for corporations as well as individuals by limiting the scope of the FECA to express advocacy." *Id.* at 472.

Likewise, in *Maine Right to Life v. Federal Election Commission*, 914 F. Supp. 8, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 66 U.S.L.W. 3254 (1997) (*MRLC*), the district court had invalidated a regulatory definition of "expressly advocating" because "it extends beyond express advocacy." 914 F. Supp. at 13. The First Circuit "affirm[ed] for substantially the reasons set forth in the district court opinion." 98 F.3d at 1. Thus, the decision below conflicts with two recent decisions of the First Circuit.

II. THIS CASE PRESENTS IMPORTANT ISSUES OF LAW.

A. The FEC's Regulation Affects the Speech of Countless Organizations, and the Speech Affected Is Entitled to the Highest Degree of First Amendment Protection.

This Court has long recognized that the First Amendment embodies a profound concern for the protection of political speech. In *New York Times v. Sullivan*, the Court stated "that freedom of expression on public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. 254, 269 (1964). Indeed, "public discussion" is not only a political right, it "is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927)

(Brandeis, J. concurring). This is because the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Therefore, as this Court explained in *Buckley*, there is no doubt that the First Amendment's framers specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 424 U.S. at 14, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966). This intention was based on the instrumental role of free speech in the system of representative self-government established by the Constitution. That is, the framers understood that free political speech is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. This Court stated that,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. Unless citizens may exercise their right to speak freely on political matters – including discussions of candidates and their qualifications – self-government is impossible. In order to make good decisions regarding who will represent us, citizens must have access to ideas and information concerning the positions candidates take on issues and to their fitness to hold office (*i.e.*, their character, accomplishments and qualifications). *Id.* In order for those ideas and that information to be available to the electorate, there must be free commerce in the marketplace of ideas. However, if the marketplace of

ideas is compromised by governmental restrictions on speech, then self-governance will suffer and so too will all of the other freedoms guaranteed by the Constitution. As this Court stated, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55. In short, free speech on political matters is the key to the preservation of self-government and concomitant personal liberties.

Despite this Court's solicitude for political speech and in particular, for "issue advocacy," the FEC has historically attempted to impinge on issue advocacy by expanding the scope of "express advocacy." Ever since this Court's 1976 decision in *Buckley*, the agency has engaged in a relentless effort aimed at modifying the holding that issue advocacy is constitutionally protected and that only speech which in express terms advocates the election or defeat of a clearly identified candidate may be regulated.[22] This effort has been repeatedly rebuffed by the lower federal judiciary. In its opinion in *MRLC, supra*, the district court chronicled a portion of the FEC's effort as follows:

> In the context of corporate contributions or expenditures, the FEC was *unwilling to limit its enforcement activities to express advocacy* of the election or defeat of a particular candidate or candidates. Even after *Massachusetts Citizens for Life* held that such express advocacy was the limit on prohibited activity, the FEC refused to revise its regulations to fit this standard until this court explicitly held them to be illegal, the

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[22] *See* n.8, *supra*.

> First Circuit affirmed, and the U.S. Supreme Court denied certiorari.

914 F. Supp. at 8 (emphasis added). As the Fourth Circuit recently summarized, the decision below "is only the most recent in a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'express advocacy' and the permissible scope of the FEC's authority over corporate political speech." *CAN II, supra*, 110 F.3d at 1055.

Although often expressed in abstract terms, the threat to representative government posed by restrictions of political speech is both real and substantial. The FEC's regulation has the force of law throughout the country. Like MRLC, many organizations across the country which are organized as corporations publish voter guides during federal election campaigns.[23] These publications give the voters vital information relevant to their intelligent exercise of the franchise and assist them in holding their representatives accountable for the conduct of their official duties. They reside at the heart of First Amendment concerns, because they perform exactly the function in our democracy that the framers of the First Amendment envisioned. Their publication adds to the quantity and diversity of speech in the American political arena.

However, after its first judicial test in the court below, the FEC voter guide regulation continues to prohibit protected speech (*i.e.*, "electioneering messages")

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[23] As two commentators have noted, "voter guides have a long tradition in American politics, and groups across the political spectrum issue them." Larry J. Sabato and Glenn R. Simpson, *Dirty Little Secrets: The Persistence of Corruption in American Politics* 127 (1996).

and, therefore, will have an adverse effect on the exercise of issue-oriented speech. Moreover, the decision below casts serious doubt on the more fundamental right of corporations to engage in unrestricted issue advocacy from their corporate treasuries – a right which prior to the court of appeals' erroneous decision was perfectly clear. Precisely the type of speech which the framers judged imperative to the survival of democracy will go unpublished and unheard. The FEC should not be permitted to deny speakers the right to communicate, nor the electorate the right to hear, such vital information.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 6, 1997

APPENDIX A

Robin CLIFTON and Maine Right to Life Committee, Inc., Plaintiffs, Appellees,

v.

FEDERAL ELECTION COMMISSION, Defendant, Appellant.

No. 96-1812.

United States Court of Appeals, First Circuit.

Heard Dec. 4, 1996.

Decided June 6, 1997.

Nonprofit corporation brought action to challenge validity of Federal Election Commission (FEC) regulations. The United States District Court for the District of Maine, D. Brock Hornby, J., 927 F.Supp. 493, held that all but one of the challenged regulations were invalid. FEC appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) voter guide regulation was invalid insofar as it limited any contact with candidates to written inquiries and replies and imposed equal space and prominence restriction, and (2) voting record regulation was invalid insofar as FEC purported to prohibit mere inquiries to candidates regarding decision on content and distribution of voting records.

Modified in part and remanded in part.

Bownes, Senior Circuit Judge, dissented and filed opinion.

David Kolker, Washington, DC, with whom Lawrence M. Noble and Richard B. Bader were on brief, for appellant.

James Bopp, Jr., Terre Haute, IN, with whom Paul R. Scholle, Bopp, Coleson & Bostrom, Terre Haute, IN, Daniel M. Snow and Pierce Atwood, Portland, ME, were on brief, for appellees.

Before SELYA, Circuit Judge, BOWNES, Senior Circuit Judge, and BOUDIN, Circuit Judge.

BOUDIN, Circuit Judge.

The plaintiff Maine Right to Life Committee ("Maine Committee") brought this action in the district court to challenge the validity of new regulations of the Federal Election Commission ("FEC"). The Maine Committee is a nonprofit membership corporation, exempt under the Internal Revenue Code, which engages in various activities in opposition to abortion. It accepts donations from other corporations for its general fund.

Among its activities thus funded is the publication of voter guides describing the position of congressional candidates on "pro-life" issues and the publication of congressional voting records on the same issues. Its coplaintiff Robin Clifton is a recipient and reader of these publications. The FEC regulations, effective March 13, 1996, purport to regulate voter guides and voting records in several different respects pertinent here.

Voting records. The new FEC regulation on voting records not only prohibits corporations and unions from expressly advocating the election or defeat of particular identified candidates – a restriction not challenged by the plaintiffs – but also provides that even without such advocacy "[t]he decision on content and the distribution

of voting records shall not be coordinated with any candidate, group of candidates or political party." C.F.R. § 114.4(c)(4). "Coordination" is not defined.

Voter guides. Along with the restriction on express advocacy, the regulation on voter guides provides that either a corporation or union publishing a guide must have no contact at all with any candidate or political committee regarding the preparation, contents and distribution of the voter guide or, if there is such contact, (1) it must be only through written questions and written responses, (2) each candidate must be given the same prominence and space in the guide, and (3) there must be no "electioneering message" conveyed by any scoring or rating system used, or otherwise. 11 C.F.R. § 114.4(c)(5).

The district court granted a declaratory judgment holding the regulations just described, apart from the ban on express advocacy, "invalid as not authorized" by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("the Act"), "because they restrict issue advocacy in connection with expenditures." *Clifton v. FEC*, 927 F.Supp. 493, 500 (D.Me.1996). Some of the district court's reasoning is directed to the statute, and some to a right of corporate "issue advocacy" set forth in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986).

We begin with the statute, partly because of the district court's reliance on it and partly because of the general precept against deciding constitutional issues unless necessary. The provision of the Act on which the FEC relies for authority is 2 U.S.C. § 441b. In pertinent part it

prohibits any corporation or union from making "a contribution or expenditure in connection with any" federal presidential or congressional election or primary. The Act does permit limited activities of this kind from "segregated" funds that are heavily regulated and are typically known as political action committees (PACs). *See Massachusetts Citizens*, 479 U.S. at 253-54, 107 S.Ct. at 625-26.

In *Massachusetts Citizens*, the Supreme Court held that section 441b prohibits corporate and union contributions but, as to expenditures other than contributions, the Court narrowly construed the statutory ban as limited to "express advocacy" of the election or defeat of a candidate. *Id.* at 249, 107 S.Ct. at 623. Thus, as glossed by the Supreme Court to avoid "overbreadth," *id.* at 248, 107 S.Ct. at 622-23, the statute does not prevent corporations and unions from engaging in issue advocacy including publication of the records and positions of federal election candidates.

Previously, the FEC adopted a regulation under the same section that required voter guides to be "nonpartisan": they could describe the candidates' positions but could not express the organization's opinion on the issues presented. This court held the new limitation to be a straightforward restriction on issue advocacy and therefore beyond the scope of the statute as construed by the Supreme Court. *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991).

In response to *Faucher*, the FEC has issued the voter guide regulation at issue in the present case and has chosen a different tack. Instead of claiming any direct

authority to regulate issue advocacy – a claim rejected by *Massachusetts Citizens* and *Faucher* – the FEC defends its new regulations as defining, or at least enforcing, section 441b's prohibition on contributions. It reasons that a voting record or voter guide publication that fails to comply with its regulation is either a contribution or can be banned in the interests of preventing prohibited contributions.

The claim that noncomplying publications are *therefore* contributions is untenable. The Supreme Court has said, in discussing related statutory provisions, that expenditures directed by or "coordinated" with the candidate could be treated as contributions, *see Buckley v. Valeo*, 424 U.S. 1, 46, 96 S.Ct. 612, 647-48, 46 L.Ed.2d 659 (1976); but "coordination" in this context implied some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue. *Id.* at 46-47 & n. 53, 96 S.Ct. at 647-48 & n. 53; *see also Colorado Republican Fed. Campaign Comm. v. FEC*, ___ U.S. ___, ___, 116 S.Ct. 2309, 2319, 135 L.Ed.2d 795 (1996) (opinion of Breyer, J.).

On its face, the FEC's voter guide regulation bars non-written contact not merely regarding the preparation and distribution of voter guides, but also regarding their *contents*. 11 C.F.R. § 114.4(c)(5)(i), (ii)(A). Thus, the regulation expressly prohibits a simple oral inquiry by the Maine Committee as to a candidate's position; and the district court tells us that the FEC's counsel admitted at oral argument that the FEC similarly interprets its ban on "coordination" of voting record publications. 927 F.Supp. at 498. The FEC can construe terms but it cannot rewrite the dictionary and classify a simple inquiry as a contribution. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-99,

96 S.Ct. 1375, 1383-84, 47 L.Ed.2d 668 (1976); *cf. Colorado Republican*, ___ U.S. at ___, ___-___, 116 S.Ct. at 2319, 2321-22 (opinions of Breyer, J., and Kennedy, J.).

But if ordinary standards of agency power are applied, the FEC has a stronger claim – constitutional limitations aside – that it can on prophylactic grounds ban oral contacts for voting records and voter guides, and perhaps require similar amounts of coverage of candidates in voter guides. True, not all oral contacts or different allocations of space will involve collaboration with the candidate. But some will, and the FEC's restrictions may reduce the risk of collaboration by making it easier to detect and less effective where it occurs.

Normally an agency with rulemaking power has a measure of latitude where it is dealing with the regulated entity (here, corporations and unions) and where the rule is reasonably designed to achieve the statute's goal (here, to prohibit certain types of contributions). The FEC has such rulemaking power. 2 U.S.C. § 437d(a)(8); *Buckley*, 424 U.S. at 110, 96 S.Ct. at 678. Agencies often are allowed through rulemaking to regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted. *See Mourning v. Family Publications Serv.*, 411 U.S. 356, 369-71, 93 S.Ct. 1652, 1660-62, 36 L.Ed.2d 318 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78, 88 S.Ct. 1994, 2005-06, 20 L.Ed.2d 1001 (1968); *Alexander v. Trustees of Boston Univ.*, 766 F.2d 630, 636-38 (1st Cir.1985).

We think it is thus not altogether easy to avoid approaching the question whether what the FEC is doing is constitutional. True, one could say that it is regulating

issue advocacy while claiming to regulate contributions. But in a sense the FEC is doing both at the same time; and the statute, it should be noted, does not itself forbid reasonable regulation of contributions that happens also to burden issue advocacy. As a statutory matter, the Act simply stops short of prohibiting issue advocacy. *Massachusetts Citizens*, 479 U.S. at 249, 107 S.Ct. at 623; *Faucher*, 928 F.2d at 471.

Turning then to constitutional issues, we face at the outset the claim of the Maine Committee that it has a constitutional right of issue advocacy that is unreasonably burdened by the regulations here at issue. In *Massachusetts Citizens*, the Supreme Court not only narrowed section 441b by construction but also recognized a First Amendment right to issue advocacy, on behalf of a nonprofit corporation fairly similar to the Maine Committee, that extends to the publication of voter guides. 479 U.S. at 263, 107 S.Ct. at 630-31.

The difficulty is that in that same case, the Supreme Court stressed as "essential" the fact that the anti-abortion group there involved did not accept contributions from business corporations or unions. *Id.* at 264, 107 S.Ct. at 631. This was important to the Court because it had previously sustained the right of Congress to limit the election influence of massed economic power in corporate or union form. *FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-10, 103 S.Ct. 552, 559-61, 74 L.Ed.2d 364 (1982). And somewhat later, the Court upheld a state statute that barred campaign-related issue advocacy, out

of general funds, by a nonprofit entity funded by business corporations. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664-65, 110 S.Ct. 1391, 1400, 108 L.Ed.2d 652 (1990).

The Maine Committee does accept contributions from other corporations, *Clifton*, 927 F.Supp. at 494, and falls somewhere between the entity protected in *Massachusetts Citizens* and that held unprotected in *Austin*. It is unclear what the Supreme Court would say about the existence or extent of a constitutional right of campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee. Nor does the record permit us to disregard *Austin* on the ground that corporate contributions to the Maine Committee are *de minimis*.[1]

If the Maine Committee had the same constitutional right to issue advocacy as its Massachusetts counterpart, the two principal rules at issue might well fail under a strict scrutiny standard. As we will see, the limit on oral contact and the obligation to provide equal space are significant burdens and, as merely prophylactic rules that go beyond the threat (unauthorized corporate contributions), the rules likely would not meet the narrow tailoring requirement. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496, 498-500, 105 S.Ct. 1459,

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[1] Despite *Austin*, two circuits have ruled that entities might still obtain the protection of *Massachusetts Citizens* where business contributions were in fact minor even though not strictly banned by the organization. *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir.1995); *Day v. Holahan*, 34 F.3d 1356, 1364 (8th Cir.1994), *cert. denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995). We take no view as to the correctness of these decisions.

1468, 1469-70, 84 L.Ed.2d 455 (1985). But the Court may hold that the Maine Committee's acceptance of corporate contributions brings *Austin* into play.

We think that the present case can be decided on grounds that do not require us to decide whether *Austin* applies to the Maine Committee, an issue only the Supreme Court can resolve definitively. For even apart from their impact on issue advocacy, the two main FEC rules at issue curtail constitutional rights that corporations unquestionably do possess. Whether the curtailment goes too far as a constitutional matter need not be decided: it is enough that it undermines the FEC's claim of authority for its rules.

Starting with the FEC rule requiring substantially equal space and prominence, we begin with the proposition that where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write. Commercial labeling aside, the Supreme Court has long treated compelled speech as abhorrent to the First Amendment, whether the compulsion is directed against individuals or corporations.[2] And while no case is

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[2] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, ___, 115 S.Ct. 1511, 1519-20, 131 L.Ed.2d 426 (1995); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, ___, 115 S.Ct. 2338, 2347, 132 L.Ed.2d 487 (1995); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 108 S.Ct. 2667, 2676-77, 101 L.Ed.2d 669 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16, 106 S.Ct. 903, 911-12, 89 L.Ed.2d 1 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 2838-39, 41 L.Ed.2d 730

an exact match for this one, *Miami Herald* comes pretty close.

There, the Supreme Court struck down Florida's "right of reply" statute that guaranteed a political candidate equal space to reply to newspaper attacks or criticism. 418 U.S. at 256, 94 S.Ct. at 2838-39. The Court said that even if no additional costs were imposed by "compulsory access," nevertheless

> [t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.

Id. at 258, 94 S.Ct. at 2840. The statute failed even though the state did not dictate the content of the reply, nor did the newspaper purport to endorse it. Reaffirming *Miami Herald*, the Supreme Court not long ago described that case as involving a law that altered "content." *Riley*, 487 U.S. at 795, 108 S.Ct. at 2676-77.

It seems to us no less obnoxious for the FEC to tell the Maine Committee how much space it must devote in its voter guides to the views of particular candidates. We assume a legitimate FEC interest in preventing disguised contributions; but Florida's interest in fair coverage that prompted its "right of reply" statute was hardly trivial. The point is that the interest cannot normally be secured by compelling a private entity to express particular views

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(1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

or by requiring it to provide "balance" or equal space or an opportunity to appear. *See, e.g., Hurley*, 515 U.S. at ___, 115 S.Ct. at 2347; *Miami Herald*, 418 U.S. at 256, 94 S.Ct. at 2838-39.

First Amendment concerns may be less where the government requires balance or access than where it dictates the precise viewpoint to be expressed. But, unlike "time, place and manner" limitations, the FEC's equal space or prominence requirement, even if mechanically applied, does affect the *content* of the Maine Committee's voting guide. Thus, the Maine Committee could be compelled to devote substantial space to describing the position of a candidate with whom it deeply disagrees. As the Supreme Court said unanimously in *Hurley*, 515 U.S. at ___, 115 S.Ct. at 2347:

> this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid, *McIntyre*, . . . *Riley*. . . .

Few, if any, rights are absolute, but there is a strong First Amendment presumption against content-*affecting* government regulation of private citizen speech, even where the government does not dictate the viewpoint. *See Riley*, 487 U.S. at 797-98, 108 S.Ct. at 2677-78; *Pacific Gas*, 475 U.S. at 16, 106 S.Ct. at 911-12; *Miami Herald*, 418 U.S. at 256, 94 S.Ct. at 2838-39. Indeed, even for broadcasters and cable monopolies, the Supreme Court has upheld equal coverage and "must carry" provisions only because of the unique control that broadcasters and cable operators have over public access to programming. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 655-57, 114

S.Ct. 2445, 2465-67, 129 L.Ed.2d 497 (1994); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392-94, 89 S.Ct. 1794, 1807-09, 23 L.Ed.2d 371 (1969). That rationale has no conceivable application to the Maine Committee.

The other rule principally at issue is the limitation on oral contact with candidates. We think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. As we have explained, the regulations bar non-written contact regarding the *contents*, not merely the preparation and distribution, of voter guides and voting records; thus, inquiries to candidates and incumbents about their positions on issues like abortion are a precise target of the FEC's rules as applied here.[3]

It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. The only difference between such an outright ban and the FEC rule is that the FEC permits discussion so long as

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[3] Indeed, the chilling effect of such a restriction would extend well beyond any discussion directed to a particular voter guide; *any* inquiry by the Maine Committee to a local representative or candidate regarding his or her position on such issues would be vulnerable even if no mention whatever were made of any voter guide. *Cf. Riley*, 487 U.S. at 794, 108 S.Ct. at 2676.

both sides limit themselves to writing. Both principle and practicality make this an inadequate distinction.

It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives. Further, the restriction is a real handicap on intercourse: the nuances of positions and votes can often be discerned only through oral discussion; as any courtroom lawyer knows, stilted written interrogatories and answers are no substitute for cross-examination. A ban on oral communication, solely for prophylactic reasons, is not readily defensible.

The Supreme Court has echoed this view, albeit in dicta. In upholding the Attorney General's refusal to grant a temporary visa to a foreign journalist invited to participate in academic conferences in the United States, the Court said,

> The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. . . . [W]e are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

Kleindienst v. Mandel, 408 U.S. 753, 765, 92 S.Ct. 2576, 2583, 33 L.Ed.2d 683 (1972). *See also Pell v. Procunier*, 417 U.S. 817, 825, 94 S.Ct. 2800, 2805, 41 L.Ed.2d 495 (1974).

Such writing-only restrictions have sometimes been upheld in the context of *commercial* speech, *e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467, 98 S.Ct. 1912, 1924, 56 L.Ed.2d 444 (1978) (limiting in-person attorney solicitation of clients); but the Court has never even remotely approved such a restriction of political expression. In fact, in a companion decision to *Ohralik*, the Supreme Court found such prophylactic rules unconstitutional as applied to solicitations by nonprofit organizations offering free legal assistance, explaining that the latter comprises core protected speech and association, and that in the latter context the First Amendment does not tolerate government regulation that might well pass muster where directed to the "conduct of commercial affairs." *In re Primus*, 436 U.S. 412, 434, 98 S.Ct. 1893, 1906, 56 L.Ed.2d 417 (1978).

With respect to both rules – the equal space and prominence and the writing-only requirements – we readily accept that the government has an interest in unearthing disguised contributions. But the FEC is free to investigate any instance in which it thinks that inquiry has become collaboration; nothing, apart from conclusory allegations, has been offered by the FEC to suggest that ordinary enforcement measures cannot adequately police "secret" corporate contributions. *Cf. Turner Broadcasting*, 512 U.S. at 664, 668, 114 S.Ct. at 2470, 2472 (plurality opinion). What it cannot do – at least without direct authorization – is simply to say that it is easier or more convenient to impair First Amendment interests than to prove a violation by conventional means or by more carefully tailored regulations.

The FEC might argue that it has not compelled speech or prevented oral access in absolute terms; it has merely said that these rules apply *if* a corporation wants to publish voting records or voter guides using its general treasury funds. And under *Austin*, Congress could constitutionally prohibit business corporations from engaging in these activities except through segregated funds; possibly, the Maine Committee is in the same position, depending on whether the Court views it as falling under *Massachusetts Citizens* or under *Austin*.

Yet the doctrine of unconstitutional conditions limits the government's ability to make someone surrender constitutional rights even to obtain an advantage that could otherwise be withheld. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 2000-01, 76 L.Ed.2d 129 (1983). Here, a surrender of such rights is being required in order to do something – to publish political information about voting guides or records – that Congress has not made unlawful. We are not certain that Congress could require this sacrifice based on its own judgment of need, but the law in this realm is far from clear. *Compare Rust v. Sullivan*, 500 U.S. 173, 196-200, 111 S.Ct. 1759, 1773-76, 114 L.Ed.2d 233 (1991) *with O'Hare Truck Serv., Inc. v. City of Northlake*, ___ U.S. ___, ___-___, 116 S.Ct. 2353, 2356-57, 135 L.Ed.2d 874 (1996).

Still, it is not necessary to resolve this last issue here. Even if the rules are otherwise "reasonable," we do not take Congress to have authorized rules that sacrifice First Amendment interests. There is a long tradition of construing statutes narrowly to avoid constitutional issues. Indeed, the Supreme Court took just such an approach in

striking down an NLRB regulation as unauthorized without finding it necessary to decide the ultimate First Amendment issue. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78, 108 S.Ct. 1392, 1397-99, 99 L.Ed.2d 645 (1988). *Accord Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C.Cir.1995) (FEC rules).

What we have said disposes of the two main restrictions in contention – the equal space and prominence requirement and oral contacts ban – both of which appear in the regulation governing voter guides. The voting record regulation does not explicitly contain either the requirement or the ban: it merely says (apart from the unchallenged limitation on express advocacy) that "[t]he decision on content and the distribution of voting records shall not be coordinated with any candidate." 11 C.F.R. § 114.4(c)(4).

But, as already noted, the FEC told the district judge at oral argument that prohibited "coordination" included seeking an explanation from the representative (for example, where there were several apparently conflicting votes). If the FEC does read its regulation in this fashion, it would to this extent raise the same constitutional concern about access, and reflect the same unauthorized use of rulemaking authority. This declaration ought to satisfy the Maine Committee's legitimate concern about misuse of the regulation.

Finally, in two paragraphs at the close of its brief, the Maine Committee also asserts that the voter guide regulation is unconstitutionally vague in its dual ban on including "an electioneering message" in a voter guide and on

seeking to "score or rate the candidates' responses in such a way as to convey an electioneering message." 11 C.F.R. §§ 114.4(c)(5)(ii)(D), (E). This restriction applies only where the entity publishing the guide has chosen to contact the candidate.

To our surprise, the FEC reply brief does not even pretend to explain what the FEC means by "electioneering message"; instead the brief resorts to generalities about the tests for unconstitutional vagueness ("no more than a reasonable degree of certainty can be demanded"), tests mostly used in contexts where speech is not involved. It then points to its "advisory opinion process" as a method for obtaining clarification. The FEC also says that the Maine Committee's argument is perfunctory. It is, but so is the FEC's reply, and the substance of the Maine Committee's concern – vagueness – is readily apparent.

The FEC might have argued that "electioneering message" is simply another version of the ban on express advocacy upheld by the Supreme Court. But the FEC has conspicuously declined to make that argument. Nor is it clear why, if the FEC meant the phrase to be limited to express advocacy, it did not simply use those words, which are used in a different provision of the same regulation, 11 C.F.R. § 114.4(c)(5)(i), and also in the voting records regulation. We are thus entitled to assume that "electioneering message" has a different, broader meaning.

The district court expressly declined to reach the issue, 927 F.Supp. at 500 n. 7, apparently believing that this restriction could not be severed from other parts of the voter guide regulation that the district court had

struck down. But the district court opinion did not explain why and, if the FEC wants to assert severability (its position is not revealed), an argument can be made that the electioneering message ban, if valid, can stand on its own two feet. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S.Ct. 1811, 1819, 100 L.Ed.2d 313 (1988).

We have no intention of trying to resolve any of the issues thus implicated, based on inadequate briefing and in darkness as to the FEC's own position as to content, purpose and severability. The Supreme Court's treatment of related vagueness issues in *Buckley*, 424 U.S. at 40-44, 96 S.Ct. at 645-47, and *Massachusetts Citizens*, 479 U.S. at 248-49, 107 S.Ct. at 622-23, suggests that the vagueness attack is not frivolous, but those cases differ in various respects from this one on the merits. And, at the threshold, are issues of severability and ripeness.

We therefore conclude that the plaintiffs' attack on the "electioneering message" provisions of the regulation should be remanded for further proceedings in the district court. For the same reason, we leave it to the district court to decide whether, in the first instance, temporary relief against these provisions is warranted *pendente lite*. Indeed, the FEC may prefer to defer enforcement of these provisions for the time being, if it seeks *certiorari* on the other issues decided today.

Our discussion leads us to *modify* the district court's judgment as follows: the voting record regulation, 11 C.F.R. § 114.4(c)(4), is declared invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates, and the voter guide regulation, *id.* § 114.4(c)(5), is declared invalid only insofar as it limits any contact with

candidates to written inquiries and replies and imposes an equal space and prominence restriction. The validity of the "electioneering message" provisions of the latter regulation is *remanded* for further proceedings in accordance with this opinion.

It is so ordered.

BOWNES, Senior Circuit Judge, dissenting.

I dissent because I disagree with the majority's holding that the FEC's written-contact-only regulation infringes the First Amendment guarantee of freedom of speech. Even where governmental regulations have "the potential for substantially infringing the exercise of First Amendment rights," the Supreme Court has "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the free functioning of our national institutions is involved." *Buckley v. Valeo*, 424 U.S. 1, 66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976) (per curiam) (internal quotation marks omitted).

At this stage of American history, it should be clear to every observer that the disproportionate influence of big money is thwarting our freedom to choose those who govern us. This sad truth becomes more apparent with every election. If preventing this is not a compelling governmental interest, I do not know what is.

The FEC, through its voter guide regulation, has tried to prevent such abuses, consistent with Supreme Court precedent that protects First Amendment interests. I believe the FEC has successfully navigated a safe path between these competing concerns, and has achieved a

reasonable prophylactic measure while complying with the Court's teachings. The Court itself has, over the years, grown more and more concerned with "domination of the political process" by corporate wealth. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 659, 110 S.Ct. 1391, 1397, 108 L.Ed.2d 652 (1990). I believe the written-contact-only requirement in the FEC's voter guide regulation fits comfortably within the Court's guidelines because its burdens on First Amendment freedoms are among those the Court is willing to permit in order to achieve compelling governmental interests like those at issue here, and the requirement is narrowly tailored to achieve that interest.

The majority strikes down the FEC's written-contact-only rule, citing virtually no authority for its position. I recognize that the plaintiff, Maine Right to Life Committee, Inc. (MRTLC), has articulated a First Amendment interest, but in my view that interest is outweighed by the compelling governmental interest in preventing corruption and corporate domination of the political process. The majority, after finding a First Amendment interest, fails altogether in pursuing this next step in the appropriate First Amendment analysis.

I believe that the prophylactic measures contained in the FEC's regulation are narrowly tailored to achieve the permissible end: they do not preclude all oral discussions of issues between groups like MRTLC and electoral candidates, as the majority states, *see ante* at 1314-1315 & n. 3. The regulation deals only with oral discussions relating to preparation of voter guides. Generally speaking, MRTLC is free to have all the oral discussions that it wishes with candidates, whether motivated by a desire to

lobby, to persuade, to debate, or to clarify. The only limitation is that MRTLC not combine its oral "issue advocacy" with a discussion of its plans to spend significant amounts of money to prepare and disseminate voter guides. "[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678, 110 S.Ct. at 1407 (Stevens, J., concurring).

The majority has set up a straw man and then shot it down, without reliance on any relevant authority. It has failed to address the real issues involving this regulation, and to come to grips with the evolving Supreme Court precedent relating to campaign finance law. I will turn to that precedent after discussing the appropriate standard of review that we should apply in this case.

Scope of Review

MRTLC has challenged the FEC's regulation on its face, not as applied to MRTLC itself. In attacking the facial validity of a regulation, a plaintiff faces a "heavy burden," to show that the regulation can *never* be applied constitutionally. *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-98, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984). "The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *Rust*, 500

U.S. at 183, 111 S.Ct. at 1767 (brackets in original) (quotation omitted). For example, in *Buckley*, the Court recognized that "[t]here could well be a case" where "the Act's [disclosure] requirements cannot be constitutionally applied," but the Court nevertheless upheld the requirements because none of the challengers "tendered record evidence" that such would actually occur; they merely stated their "fears" of what might happen. 424 U.S. at 71, 96 S.Ct. at 659-60. Thus, where a rule is being challenged on its face, it would be "inappropriate" to strike it down merely because the plaintiff can envision "an imagined unlawful application of the rule." *Massachusetts v. United States*, 856 F.2d 378, 384 (1st Cir.1988). *See also Renne v. Geary*, 501 U.S. 312, 324, 111 S.Ct. 2331, 2340, 115 L.Ed.2d 288 (1991) (facial challenge should generally not be entertained when an 'as-applied' challenge could resolve the case).

The district court's determination that the FEC's regulation is facially invalid presents a purely legal question, and is therefore reviewable *de novo*. *Duffy v. Sarault*, 892 F.2d 139, 145 (1st Cir.1989).

In reviewing agency action, if Congress has not "directly addressed the precise question at issue," a reviewing court must defer to an agency's interpretation of the statute it is charged with enforcing, if that interpretation is not "manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Strickland v. Commissioner, Maine Dep't of Human Servs.*, 96 F.3d 542, 545-47 (1st Cir.1996) ("*Strickland II*"); *Strickland v. Commissioner, Maine Dep't of Human Servs.*, 48 F.3d 12, 16-17 (1st Cir.), *cert. denied*, ___ U.S. ___,

116 S.Ct. 145, 133 L.Ed.2d 91 (1995) ("*Strickland I*"). A reviewing court will not "simply impose its own construction" as to the meaning of ambiguous or unclear statutory terms, "as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue," and the agency has furnished its interpretation, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[4] *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782; *Strickland II*, 96 F.3d at 546. The FEC "is precisely the type of agency to which [such] deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 45, 70 L.Ed.2d 23 (1981).

Of course, a court will not defer to an agency's interpretation of a statute that is directly contrary to a prior Supreme Court interpretation of the same statutory provision. *See Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir.1991). Nor will a court defer to an interpretation that is unconstitutional. I address the First Amendment question *de novo*, through the prism of the Court's teaching in this area.

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[4] "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981)).

The Applicable Law Governing Campaign Finance Limitations

The Supreme Court has observed that the "integrity of our system of representative democracy is undermined" by corruption. *Buckley,* 424 U.S. at 26-27, 96 S.Ct. at 638. Although the Court decided a number of cases governing campaign finance law prior to *Buckley,*[5] and although *Buckley* dealt only with individuals and unincorporated associations and not with corporations as plaintiff MRTLC is here, *Buckley* is usually viewed as the starting point in any analysis of election law. *Buckley* was also the first case to interpret the statute applicable here, the Federal Election Campaign Act, as amended in 1974, which significantly tightened federal election campaign financing in the wake of the Watergate scandals.

The Court began its analysis by noting that money spent on communication was the equivalent of speech itself.[6] Therefore the Court recognized that limitations on

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[5] The Court has recounted some of the long prior history of legislation regulating campaign financing in *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208-09, 103 S.Ct. 552, 559-60, 74 L.Ed.2d 364 (1982); *Pipefitters v. United States*, 407 U.S. 385, 402-12, 92 S.Ct. 2247, 2258-63, 33 L.Ed.2d 11 (1972); *United States v. Automobile Workers*, 352 U.S. 567, 570-87, 77 S.Ct. 529, 530-30 [sic], 1 L.Ed.2d 563 (1957).

[6] Experience has demonstrated that *Buckley* may have been too hasty in equating money with speech. *Buckley* began with the premise that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of [our] system of government." 424 U.S. at 14, 96 S.Ct. at 632. This is because, in a republic such as ours, "the ability of the citizenry to make informed choices among candidates for office is essential." *Id.* at 14-15, 96 S.Ct. at 632. "The First Amendment

contributions impinged upon First Amendment values in the "uninhibited, robust, and wide-open" debate that is

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affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 14, 96 S.Ct. at 632. Because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," the Court in *Buckley* concluded that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19, 96 S.Ct. at 634.

In reality, however, *Buckley* 's equation of money and speech does not serve the goal of ensuring that the best ideas emerge from a true (and fair) competition among differing viewpoints. Rather than rewarding people or candidates who put forward good ideas, this system rewards people who happen to control vast amounts of money. In light of the uneven playing field created by the unequal distribution of income and wealth in our society, some people can afford to purchase more of the high-cost means of speech than can other people. The Court has recognized that financial considerations "may make the difference between participating and not participating in some public debate." *See City of Ladue v. Gilleo,* 512 U.S. 43, 57, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994). Thus, "however neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact. There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris." *NAACP, Western Region v. City of Richmond,* 743 F.2d 1346, 1356 (9th Cir.1984) (alluding to the famous aphorism of Anatole France); *see also Griffin v. Illinois,* 351 U.S. 12, 23, 76 S.Ct. 585, 592-93, 100 L.Ed. 891 (1956) (Frankfurter, J., concurring) (same). Therefore, we must carefully scrutinize even facially neutral laws if their effects on speech "fall unevenly on different viewpoints and groups in society." *City of Richmond,* 743 F.2d at 1356. And we must avoid giving "one side of a debatable public question an advantage in expressing its

necessary to enable people to make informed choices among candidates. *Buckley*, 424 U.S. at 14, 96 S.Ct. at 632 (quotation omitted).

Nevertheless, the Court upheld the FECA's limitations on *contributions* (by individuals and unincorporated associations) to candidates or their campaign committees. Because our "[d]emocracy depends on a well-informed electorate," *id.* at 49 n. 55, 96 S.Ct. at 649 n. 55; *see id.* at 14-15, 96 S.Ct. at 632-33, the Court subjected such impingement to strict scrutiny. The Court found that, with respect to contributions to a candidate, the impingement was justified by the compelling governmental interest in limiting the actuality and appearance of corruption resulting from large financial contributions. *Id.* at 28-29, 96 S.Ct. at 639-40. Likewise, the Court upheld limits on *total* contributions by an individual, as a "modest restraint upon protected political activity [that] serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate." *Id.* at 38, 96 S.Ct. at 644.

The Court also upheld the Act's limitations on volunteers' incidental expenses as an acceptable accommodation of Congress's valid interest in encouraging citizen participation while guarding against the "corrupting potential of large financial contributions to candidates." *Id.* at 36, 96 S.Ct. at 643. The Court treated such incidental

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views to the people." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86, 98 S.Ct. 1407, 1420-21, 55 L.Ed.2d 707 (1978).

expenses as an in-kind contribution, with the same ultimate effect as if the money had been contributed directly to the candidate.

The *Buckley* Court treated limitations on independent expenditures differently than limitations on direct contributions to candidates. The Court realistically recognized that those who contributed to a candidate represented "the interests to which [the] candidate is most likely to be responsive." *Id.* at 67, 96 S.Ct. at 657. Nevertheless, in order to avoid vagueness problems, the Court limited FECA's prohibition on independent expenditures to only those expenditures which involved express advocacy. *Id.* at 44, 96 S.Ct. at 646-47. It went on to strike down that prohibition, even as so limited, as violative of the First Amendment. *Id.* at 51, 96 S.Ct. at 650. In analyzing the First Amendment considerations, the Court stated that expenditure limitations impose greater burdens on basic freedoms than do contribution limits, and do not accomplish as much to further the goals of eliminating the potential for abuse and *quid pro quo* corruption. *Id.* at 44-47, 96 S.Ct. at 646-48.

The Court's more protective approach to independent expenditures, however, applies only to expenditures that are "made *totally* independently of the candidate[s] and [their] campaign[s]." *Id.* at 47, 96 S.Ct. at 648. It found no constitutional infirmity in FECA's treatment of "coordinated" expenditures as contributions and therefore subject to FECA's limitations. *Id.* at 47 & n. 53, 96 S.Ct. at 648 & n. 53. Expenditures that are "coordinated" with a candidate or his/her campaign – which are the functional equivalent of an in-kind contribution to the candidate – are treated as direct contributions to the

candidate, rather than as independent expenditures, in order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47, 96 S.Ct. at 648. This is true regardless of whether the expenditure pays for speech containing express advocacy of a candidate. Thus, limiting such coordinated spending can "foreclose[ ] an avenue of abuse." *Id.* at 37, 96 S.Ct. at 643.

In upholding some burdens on First Amendment rights, the *Buckley* Court recognized a compelling interest in preventing *quid pro quo* corruption. It noted that, to "the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27, 96 S.Ct. at 638. Moreover, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27, 96 S.Ct. at 638-39.

Since *Buckley* was decided, more evidence has come to light demonstrating that big money can skew our democratic election process, even without a *quid pro quo*. Large donations from wealthy individuals, corporations and labor unions have helped candidates accumulate considerable stockpiles of money with which to advertise for votes. In a series of cases beginning with *FEC v. National Right to Work Comm.*, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) ("*NRWC*"), the Court has dealt with this problem in the context of § 441b of FECA, which

regulates contributions and expenditures made by corporations and labor organizations.[7] In *NRWC, FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*"Mass. Citizens"* or *"MCFL"*), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court has found a compelling governmental interest in preventing corruption even without a direct *quid pro quo* promise in exchange for money. The Court has recognized that the integrity of our electoral system can also be undermined by a different type of corruption: "vast reservoirs of capital" that "distort[ ] the political process" and prevent it from truly reflecting the voters' collective evaluation of the merits of the candidates' ideas. *See Austin*, 494 U.S. at 661, 110 S.Ct. at 1398.

The plaintiff in *National Right to Work Comm.* was an expressly ideological nonprofit association which was incorporated under state law, as is the plaintiff MRTLC in the case at bar. Recognizing that the FECA "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *National Right to Work Comm.*, 459 U.S. at 209-10, 103 S.Ct. at 560-61, the Court upheld Congress's right to restrict from whom such an organization may solicit contributions. The Court held that NRWC's associational

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[7] This is to be distinguished from the sections of FECA covered in the relevant portions of *Buckley*, which dealt with contributions and expenditures made by individuals and unincorporated groups.

rights[8] were overborne by the interests Congress sought to protect in enacting § 441b, including:

> to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions.

Id. at 207, 103 S.Ct. at 559. "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the *creation of political debts.* The importance of the governmental interest in preventing this occurrence has never been doubted." *National Right to Work Comm.*, 459 U.S. at 208, 103 S.Ct. at 559-60 (quotations omitted) (emphasis added). As in *Buckley*, the Court in *NRWC* recognized that it was just as important to prevent the appearance of such corrosion as the actuality. *Id.* at 210, 103 S.Ct. at 560-61. "These interests directly implicate the integrity of our electoral process." *Id.* at 208, 103 S.Ct. at 560 (quotation omitted).

Accordingly, the *NRWC* Court held that "the need for a broad prophylactic rule," to protect against such distortion of the political process, was "sufficient . . . to support a limitation on the ability of a committee to raise money for direct contributions to candidates." *Mass. Citizens*, 479 U.S. at 260, 107 S.Ct. at 629.

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[8] Corporations as well as individuals have First Amendment rights. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86, 98 S.Ct. 1407, 1420-21, 55 L.Ed.2d 707 (1978).

In *Mass. Citizens,* the Court shifted the focus of its examination from § 441b's regulation of corporate contributions to its regulation of corporate independent expenditures. The Court described the "underlying rationale" for "longstanding regulation" of corporate political activity as:

> the need to restrict "the influence of political war chests funneled through the corporate form," [*FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 501[, 105 S.Ct. 1459, 1470, 84 L.Ed.2d 455] (1985) ("*NCPAC*")]; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters [v. United States],* 407 U.S. [385,] 416[, 92 S.Ct. 2247, 2265, 33 L.Ed.2d 11] [(1972)]; to curb the political influence of "those who exercise control over large aggregations of capital," *[United States v.] Automobile Workers,* 352 U.S. [567,] 585[, 77 S.Ct. 529, 538, 1 L.Ed.2d 563] [(1957)]; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee,* 459 U.S. at 207[, 103 S.Ct. at 559].

Mass. Citizens, 479 U.S. at 257, 107 S.Ct. at 627. *See also id.* at 258-59, 107 S.Ct. at 628 (Congress added proscription on expenditures to Federal Corrupt Practices Act "to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power") (quotation omitted).

The Court in *Mass. Citizens* recognized that "the corrosive influence of concentrated corporate wealth" can corrupt "the integrity of the marketplace of political ideas." 479 U.S. at 257, 107 S.Ct. at 627. Regulation of

corporate political activity "has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes." *Id.* at 259, 107 S.Ct. at 628. The Court "acknowledge[d] the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *Id.* at 263, 107 S.Ct. at 630. This concern is reflected in § 441b's "require[ment] that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending," in order to "prevent this threat to the political marketplace." *Id.* at 258, 107 S.Ct. at 628. In order to avoid overbreadth, the Court defined independent expenditures governed by § 441b to include only express advocacy of the election or defeat of a candidate. *Id.* at 249, 107 S.Ct. at 623.

The Court left open the question whether the First Amendment permits it to uphold § 441b's general rule – that a corporation must utilize a voluntary PAC rather than its general treasury funds for independent campaign expenditures as well as for direct contributions to candidates. Instead, the Court carved a narrow exception out of this general rule, holding its prohibition on use of general treasury funds unconstitutional *as applied* to the narrow class of corporations exemplified by the plaintiff in *MCFL*,[9] even though those corporations remained free

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[9] "It may be that the class of organizations affected by [the *Mass. Citizens*] holding . . . will be small." *Mass. Citizens*, 479 U.S. at 264, 107 S.Ct. at 631.

to speak in unlimited amounts through a separate segregated fund (as opposed to using funds from the corporate treasury).

To fall within the exception, a corporation must have three characteristics, each of which is "essential," *MCFL*, 479 U.S. at 263, 107 S.Ct. at 630-31: First, it must be formed for the express purpose of promoting political ideas, and cannot engage in business activities. Second, it must have no shareholders or other persons affiliated who would have a claim on its assets or earnings. Third, it must not be established by a business corporation or labor union, nor accept contributions from such entities. *Id.* at 264, 107 S.Ct. at 631. The last requirement – that the corporation does not accept contributions from business corporations or labor unions – is "essential," because it "prevents such [nonprofit ideological] corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 263-64, 107 S.Ct. at 631.

In *Austin*, 494 U.S. at 659, 110 S.Ct. at 1397, the Court elaborated its "concern about corporate domination of the political process" and decided the question left open in *Mass. Citizens*. The plaintiff in *Austin*, the Chamber of Commerce, had challenged a Michigan statute (similar to 2 U.S.C. § 441b) prohibiting corporations from using treasury funds for independent expenditures in support of a candidate. The Court found that the statute burdened political speech at the core, even though the corporation

still had the opportunity to speak through PACs.[10] Despite this burden on First Amendment rights, the Court held that the burden was justified by a compelling governmental interest in counteracting the "corrosive and distorting effects" of corporate wealth on the political election process. *Id.* at 660, 110 S.Ct. at 1410-11.

State law grants corporations special privileges that enhance their ability to attract capital and deploy resources advantageously. These privileges include: limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. *Id.* at 658-59, 110 S.Ct. at 1396-97. These state-created advantages enable corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.' " *Id.* at 659, 110 S.Ct. at 1397 (quoting *Mass. Citizens,* 479 U.S. at 257, 107 S.Ct. at 627). The Court therefore has "recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.' " *Id.* at 659, 110 S.Ct. at 1397 (brackets in *Austin*) (quoting *National Conservative PAC,* 470 U.S. at 500-01, 105 S.Ct. at 1470).

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[10] To require a corporation to use a PAC rather than general corporate treasury funds would require it to comply with a number of obligations it might find burdensome. For example: PACs must designate a treasurer, keep detailed accounts of contributions, and file a statement of organization; PACs cannot use corporate funds at all; and PACs may not solicit contributions except from members, stockholders or officers. *See Austin,* 494 U.S. at 657, 110 S.Ct. at 1396 (citing *Mass. Citizens,* 479 U.S. at 253-54, 107 S.Ct. at 625-25); 2 U.S.C. §§ 432-34; 441b(b)(4)(A), (C).

This interest reflects a "concern about corporate domination of the political process." *Id.*

The Court made clear that it was not talking merely about "financial *quid pro quo* " corruption. *Id.* at 659, 110 S.Ct. at 1397. It recognized that the government has a compelling interest in eliminating from the political process a "different type of corruption" as well: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660, 110 S.Ct. at 1397; *see id.* at 666, 110 S.Ct. at 1400-01. It is because the state confers on corporations legal advantages enabling them to amass abundant "war chests" that it is not unconstitutional for the government to limit independent expenditures by corporations. *Id.* at 666, 110 S.Ct. at 1401.

The Court's holding was not limited merely to direct contributions to candidates. "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660, 110 S.Ct. at 1398. The *Austin* Court therefore held "that the State ha[d] articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations."[11] *Id.*

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[11] The Court held that the plaintiff Chamber of Commerce in *Austin* did *not* fall within the narrow class of corporations that *Mass. Citizens* exempted from this general rule. The Court emphasized the fact that the Chamber "accepts money from for-profit corporations" which "therefore could circumvent the

Nor was this rule specifically limited to for-profit corporations engaged in a commercial business enterprise. As stated, the rule applied also to nonprofit corporations, which, after all, were the context of the case before the Court as well as the context of *National Right to Work Comm.* and of *Mass. Citizens* which relied on the *NRWC* analysis.

Our circuit has also had occasion to weigh in on this subject.[12] Our opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir.1985), *aff'd*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), was affirmed by the Supreme Court, as described *supra*, but was essentially consistent with the Court's opinion. More recently, this court considered a prior version of the FEC's regulation governing voter guides. *Faucher v. FEC*, 928 F.2d 468 (1st Cir.1991). The regulation itself was substantially different from the current regulation, containing provisions restricting the content of any voter guides.[13] The prior regulation had required guides to be "nonpartisan," and listed among the factors the FEC would consider in determining whether a guide was nonpartisan the following:

Act's restriction [on their campaign expenditures] by funneling money through the Chamber's general treasury" if the statutory limitations were not applied to the Ch nber. *Austin*, 494 U.S. at 664, 110 S.Ct. at 1400.

[12] I do not discuss opinions of other circuits because the precise issues here – validity of the present regulations governing voter guides and voting records – have not been decided previously by any circuit court.

[13] The majority opinion discusses the prior regulation and the present regulation as if they were identical. *See ante* at 1311-12.

"(C) The wording of the questions presented does not suggest or favor any position on the *issues* covered; (D) The voter guide expresses no editorial opinion concerning the *issues* presented nor does it indicate any support for or opposition to any candidate or political party." *Id.* at 470 (emphasis added in *Faucher*).

We struck down these content-oriented provisions; the speech they inhibited was protected by the First Amendment because it was an independent expenditure that contained no "express advocacy" of a particular candidate. We relied on language in *Buckley* that had held the FECA's limits on independent expenditures to be unconstitutional unless they involved "express advocacy." *Id.* (citing *Buckley*, 424 U.S. at 42-43, 96 S.Ct. at 645-46). We also relied on a similar holding in *Mass. Citizens*, 479 U.S. at 249, 107 S.Ct. at 623, which likewise dealt with independent expenditures. We declined the FEC's invitation to defer to its interpretation of the statute, on the ground that the Supreme Court had already spoken directly on the precise issue that was in dispute. *Faucher*, 928 F.2d at 471. It is worth noting that our decision in *Faucher* did not address the claim made by the FEC in the instant case, namely, that the spending of money to publish a voter guide after consultation or coordination with a candidate regarding the preparation of the guide constitutes the kind of coordinated expenditure that may be treated as a contribution, not as an independent expenditure, and therefore may be subjected to regulation.

The latest chapter in the continuing saga was written just last Term. In *Colorado Republican Campaign Comm. v. FEC*, ___ U.S. ___, ___, 116 S.Ct. 2309, 2312, 135 L.Ed.2d 795 (1996) ("*Colorado Republican*"), the Court struck down

the FECA's limits on a political party's expenditures in connection with a campaign, holding them unconstitutional *as applied* to independent expenditures that were made "without coordination with any candidate." It reiterated that the government may constitutionally set limits on contributions, including "limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate." *Id.* at ___, 116 S.Ct. at 2313 (citing § 441a). The "constitutionally significant fact" in that case was "the lack of coordination between the candidate and the source of the expenditure." *Id.* at ___, 116 S.Ct. at 2317 (citing *Buckley*, 424 U.S. at 45-46, 96 S.Ct. at 647-48). (Justice Breyer's plurality opinion mentions "coordination" or "coordinated" expenditures on nearly every page.)

The Court reversed the lower court's ruling that, as a matter of law, a party's expenditures should be "conclusive[ly] presum[ed]" to have been coordinated with the eventual candidate, even though "the record show[ed] no actual coordination as a matter of fact" (and in fact there had been evidence to the contrary). *Id.* at ___-___, 116 S.Ct. at 2317-18. The three-Justice plurality stated that the determination of coordination with a candidate is a factual matter, and cannot be presumed as a matter of law. Two dissenting Justices would have upheld the FEC's presumption and found it constitutional.

On the other hand, four Justices agreed with the Colorado Republican Party that, due to the special role of

political parties in our electoral system, the First Amendment forbids congressional efforts to limit a party's coordinated expenditures as well as independent expenditures. Those Justices would have stricken such limitations on their face.

This position was rejected by the majority of the Court. The three-Justice plurality reached its conclusion on an as-applied basis, explicitly refusing to entertain the facial challenge. While recognizing that restrictions on coordinated expenditures might in some circumstances unduly infringe on constitutional rights, the plurality indicated that it would uphold such restrictions in other circumstances, depending on the facts of the case at hand. *Id.* at ___, 116 S.Ct. at 2320. The two dissenting Justices would have rejected both the facial and the as-applied challenges.

As the foregoing history makes clear, tne Court's jurisprudence on campaign finance is evolving, especially with respect to the use of corporate wealth in candidate elections. The Court now recognizes that the corrosive and distorting effect of big money to influence elections is a legitimate governmental concern.[14] I turn now to the application of this evolving law to the issue in contention.

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[14] *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 Yale L. & Pol'y Rev. 236, 278 (1991) (arguing that courts cannot return to a laissez-faire approach in the political field any more than they would return to pre-*Lochner* laissez-faire in the economic field, and therefore that courts should treat campaign finance regulation as a legitimate exercise of the government's First Amendment antitrust role to preserve the marketplace of ideas).

Analysis

I would hold that the FEC *may* constitutionally require communications between corporations[15] and candidates regarding voter guides to be in writing.[16] While

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[15] The regulation covers both corporations and labor unions. Because MRTLC is a corporation, I will refer only to corporations in the ensuing discussion.

[16] The pertinent part of the FEC's regulation states as follows:

> (5) Voter guides. A corporation or labor organization may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization which is described in 26 U.S.C. 501(c)(3) or (c)(4), provided that the voter guides comply with either paragraph (c)(5)(i) or (c)(5)(ii)(A) through (E) of this section. The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.
>
> (i) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.
>
> (ii)(A) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation,

there may be circumstances in which such a restriction might be unconstitutional as applied, it surely survives the current facial challenge.[17] The question is whether we should uphold the FEC's characterization of MRTLC's contact with candidates as a coordinated expenditure which, under the FECA, is treated as a contribution and therefore may be regulated. Even with respect to individuals, *Buckley* created two categories of campaign spending which are to be treated differently. For the most part, limits on contributions made to candidates or their campaigns are constitutional; limits on totally independent expenditures are not (i.e., expenditures "not coordinated with the candidate or candidate's campaign"). *Colorado Republican*, ___ U.S. at ___, 116 S.Ct. at 2313 (citing *Buckley*, 424 U.S. at 39-51, 96 S.Ct. at 644-50).

Expenditures that are coordinated with the candidate or candidate's campaign, even if not contributed directly to the candidate, are "treated as contributions," and they can be regulated just as if they were direct contributions. *Buckley*, 424 U.S. at 46 & n. 53, 96 S.Ct. at 647-48 & n. 53; *Colorado Republican*, ___ U.S. at ___, 116 S.Ct. at 2313. That

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> contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing.

11 C.F.R. § 114.4(c)(5)(i), (ii)(A).

[17] *Cf. Austin*, 494 U.S. at 674 n. 4, 110 S.Ct. at 1405 n. 4 (Brennan, J., concurring) (The "central lesson of *MCFL* [is] that the First Amendment may require exemptions, on an *as-applied* basis, from expenditure restrictions" if the organization exhibits all three of the required characteristics.) (emphasis added).

is, to be treated as independent, rather than as a contribution, an expenditure must be "*totally* independent[ ]." *Buckley*, 424 U.S. at 47, 96 S.Ct. at 648. Since this is true for individuals and unincorporated organizations like political parties, it should be at least as true for corporations whose "vast reservoirs of capital," *Austin*, 494 U.S. at 661, 110 S.Ct. at 1398, pose more of a threat to "the integrity of our electoral process," *National Right to Work Comm.*, 459 U.S. at 208, 103 S.Ct. at 559 (quotation omitted), and therefore "require[ ] particularly careful regulation," *id.* at 209-10, 103 S.Ct. at 560.

The expenditure in this case occupies a middle ground: MRTLC's spending on voter guides is not contributed directly to candidates but is not totally independent either. It is coordinated with the candidate to some degree. MRTLC may be correct that this is not exactly identical to the coordination that exists when an organization buys $20,000 worth of food for a campaign rally, but it does entail some aspects of what is ordinarily thought of as coordination. *See* Random House Dictionary of the English Language 447 (2d ed.1987) ("act[ing] in harmonious combination"). And, as I will discuss shortly, it poses some of the same kinds of danger of corruption and distortion of the election process. With this in-between level of coordination, the question here is whether the degree of coordination between MRTLC and the candidates in preparing the voter guides is sufficient to treat the money spent to produce and distribute the guides as a contribution and therefore regulable, taking into account constitutional requirements. *See Colorado Republican*, ___ U.S. at ___, 116 S.Ct. at 2320.

I agree with the majority that the constitutional issue cannot be avoided by resort to statutory interpretation. The district court was mistaken to conclude that the FEC has no authority to interpret § 441b as it has, simply because the statute does not contain a provision specifically authorizing this particular interpretation. The Act generally empowers (indeed, requires) the FEC to promulgate rules and regulations "to carry out the provisions of [the] Act," 2 U.S.C. § 438(a)(8); *see also* 2 U.S.C. § 437d (a)(8), including "formulat[ing] policy with respect to" the Act. 2 U.S.C. § 437c(b)(1). It is entirely appropriate for an agency to fill in the interstices in an ambiguous or incomplete statute. *See Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-83; *Strickland I*, 48 F.3d at 21 (when statute is subject to more than one possible interpretation, "it is up to the [agency], not the courts, to balance the relevant policy considerations and formulate a rule"). Neither Congress nor the Court has specifically addressed the question of what degree of coordination is required before an expenditure may be treated as a contribution under the FECA.

Therefore a reviewing court should defer to the agency's interpretation as long as it is not "manifestly contrary to the statute," which cannot be said of the regulation at issue here. *See id.* at 844, 104 S.Ct. at 2782-83; *Strickland II*, 96 F.3d at 547 ("court must avoid inserting its own policy considerations into the mix"). Looking to other parts of the FECA for guidance, according to the general definitions section of the Act, 2 U.S.C. § 431(17), an expenditure by a corporation that is made in "cooperation or consultation" with a candidate does not qualify as an "independent expenditure." It would therefore be

treated as an indirect contribution under § 441b, as interpreted in *Buckley*, 424 U.S. at 46 & n. 53, 96 S.Ct. at 647-48 & n. 53, and *Colorado Republican*, ___ U.S. at ___, 116 S.Ct. at 2313. In addition, another provision of the Act explicitly states that, for purposes of subsection 441a(a), "expenditures made by any person in *cooperation, consultation, or concert*, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). This provision makes explicit Congress's intention that coordinated expenditures like those here – spending on voter guides that were prepared after consultation and cooperation with candidates – be considered contributions, at least for purposes of § 441a.

"[T]here is a presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 555, 130 L.Ed.2d 462 (1994). In light of this canon of statutory construction, and because nothing in § 441b specifies a different view of the term "contribution," I see no reason to second-guess the FEC's interpretation that expenditures on voter guides, the preparation of which is coordinated with candidates, should be treated as contributions under § 441b as well as under § 441a. *See Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782-83. I turn now to the question whether the statute is constitutional as so interpreted.

As already noted, plaintiff MRTLC challenges the FEC's interpretation on its face, not as-applied. With an

exception not applicable here,[18] in order to prevail on such a challenge, the plaintiff must show that the regulation can *never* be applied constitutionally. *Rust*, 500 U.S. at 183, 111 S.Ct. at 1767. This the plaintiff cannot do: MRTLC itself exemplifies an organization to which the written-contact-only regulation, 11 C.F.R. § 114.4(c)(5)(ii)(A), may constitutionally be applied. MRTLC's expenditure on voter guides is *not totally* independent of the candidates, which would be necessary to be entitled to the full protection of *Buckley* and its progeny. It is a coordinated expenditure that is legitimately treated as if it were a contribution and, as such, may be regulated by the FEC under FECA, at least by means of this limited prophylactic measure requiring that MRTLC's contacts with candidates be only in writing.

"When deciding whether a[n] . . . election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the

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[18] An alternative way for the plaintiff to prevail on a facial attack would be to demonstrate that, even though the challenged law "may be validly applied to the plaintiff and others, it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties." *New York State Club Ass'n, Inc. v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988) (quotation omitted). A facial overbreadth challenge is "an exception to ordinary standing requirements" and "will not succeed unless the statute is substantially overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* (quotation omitted). In the instant case, MRTLC's brief does not begin to meet its burden in this respect.

burden the . . . rule imposes on those rights against the interests the [government] contends justify that burden, and consider the extent to which the [government's] concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, ___ U S. ___, ___, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) (internal quotation marks omitted).

As in *Buckley* and *Austin*, when an expenditure is coordinated with a candidate, it may be treated as a contribution, in part because in both situations the burden on constitutional rights is less than would be the case for a totally independent expenditure. *Buckley* found contribution limits to be "only a marginal restriction upon the contributor's ability to engage in free communication," because "the transformation of contributions into political debate involves *speech by someone other than the contributor.*" 424 U.S. at 20, 96 S.Ct. at 635 (emphasis added).

Similarly in the case at bar, to the extent MRTLC is seeking merely to distribute a purportedly accurate reflection of the *candidates'* views on the issues, distributing the voter guides is more like helping certain candidates to express *their* views through a contribution, as distinguished from the *organization's* expressing *its* views. The burden on MRTLC's First Amendment rights is therefore less than it would be if the voter guides purported to represent MRTLC's own views. *See id.*

In addition, as Justice Brennan, one of the Supreme Court's great champions of First Amendment rights to free speech and association, noted in his concurrence in *Austin*, even the greater restrictions approved by the Court there would not impose an excessive burden on a

corporation because it was allowed to speak through PACs, even if not through general treasury funds. *Austin*, 494 U.S. at 669 n. 1, 671 n. 2, 110 S.Ct. at 1402 n. 1, 1403 n. 2. He listed "many avenues of communication" still open to the plaintiff there (the Chamber of Commerce), which showed that "the segregated fund requirement in practice has not burdened significantly the Chamber's speech." *Id.* at 676 n. 7, 110 S.Ct. at 1406 n. 7; *see Timmons*, ___ U.S. at ___, 117 S.Ct. at 1371. "[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678, 110 S.Ct. at 1407 (Stevens, J., concurring).

The burden on MRTLC's constitutional rights here is even less intrusive. The regulation's requirement that any contact with candidates be in writing is itself a relatively minor restriction, more analogous to the disclosure requirements upheld in *Buckley* than to *Austin*'s limitation on independent expenditures which the Court nevertheless upheld, although acknowledging that it would impose a heavy burden on First Amendment rights. The written-contact-only rule does not impose even as much burden on First Amendment rights as the limitations on contributions upheld in *Buckley*. In contrast to the limitations upheld in *Buckley* and *Austin* on the absolute amount of money spent, in the case at bar the type of restriction imposed by the FEC's written-contact-only regulation does not limit the quantity of speech in any way; it simply specifies the manner in which the corporation consults with candidates in preparing its voter guides. Thus, the regulation is significantly less intrusive

on MRTLC's First Amendment rights than those absolute limits on the quantity of speech.[19]

The writing requirement is also *content-neutral* (in both purpose and effect): it does not prefer any one message over another in MRTLC's voter guides, as long as the guides were prepared without any oral contact with the candidates. The rule is completely indifferent to the issues the corporation wishes to address in its voter guides and to the positions the corporation itself takes on those issues. In addition, MRTLC may say anything it wants to a candidate (or ask any questions it wants) during the preparation of the guides, as long as it does so in writing. The regulation does not limit the content of the communication between MRTLC and the candidates, only the manner (written or non-written) in which such communication is effectuated.[20]

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[19] The Court recently rejected a claim based upon what appears to me to be a much more intrusive burden. *Timmons*, ___ U.S. at ___, 117 S.Ct. at 1372. Because the "independent expression of a political party's views is core First Amendment activity," *id.* at ___, 117 S.Ct. at 1369 (internal quotation marks omitted), a political party had claimed that the state's ban on fusion candidates unconstitutionally burdened the party's right to communicate, in that the ban prevented the party from "using the ballot to communicate to the public that it supports a particular candidate" and the ban "shut[ ] off one possible avenue a party might use to send a message to its preferred candidate." *Id.* at ___, 117 S.Ct. at 1372. The Court rejected the claim and upheld the ban. *Id.*

[20] Other portions of the voter guide regulation, § 114.4(c)(5)(ii)(B)-(E), do contain restrictions on contents – forbidding guides that devote more prominence to one candidate than another or that contain an electioneering message. The written-contact-only rule, § 114.4(c)(5)(ii)(A), however, does not contain content-based requirements.

Moreover, as in *Austin*, the written-contact-only regulation applies only to the organization's use of general treasury funds; it does not apply at all to PAC money from a separate segregated fund. If MRTLC were willing to comply with the reporting and other requirements by which the FEC monitors ordinary corporate PACs, then it would not have to comply with the challenged restriction.[21] In addition, the written-contact-only rule does not apply at all to totally independent issue advocacy to the public, upon which *Austin* permitted restrictions. If MRTLC engaged in no consultation with the candidates at all, it could publish voter guides, even pay for them out of its general corporate treasury, advocating whatever position it wanted to, on any issue, as long as it did not expressly advocate the election or defeat of a clearly identified candidate. Thus, the burden on First Amendment rights posed by the challenged regulation is relatively small.

Even where governmental regulations have "the potential for substantially infringing the exercise of First Amendment rights," the Court has "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the free functioning of our national institutions is involved." *Buckley*, 424 U.S. at 66, 96 S.Ct. at 657 (internal quotation marks omitted); *see Timmons*, ___ U.S. at ___, 117 S.Ct. at 1369 (" '[A]s a practical matter, there must be

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[21] Corporations may use general treasury funds (as well as PAC funds) to finance communications with their members, stockholders, and executive and administrative personnel, on any subject. 2 U.S.C. § 431(9)(B)(iii).

a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' ") (quoting *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992)). The Court has repeatedly held that burdens on First Amendment rights more significant than those involved in the instant case were outweighed by the potential for corruption, *Buckley*, and by the corrosive and distorting effects of corporate wealth, *Austin*. Cf. *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063 ("[T]he rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."); *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir.1996).

Moreover, as the Court said in *Mass. Citizens*, "restrictions on *contributions* require *less* compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 629 (emphasis added). Because less of a justification was required, "the need for a broad prophylactic rule was thus sufficient . . . to support a limitation on the ability of a committee to raise money for direct contributions to candidates."[22] *Id.* at 260, 107 S.Ct. at 629.

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[22] The Court was not troubled by the fact that a prophylactic rule might sweep broadly, restricting corporations with less money as well as those with substantial war chests. *Austin*, 494 U.S. at 661, 110 S.Ct. at 1398. Because it is the "potential" for big money to have an unfair influence that "demands regulation," the Court would not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *National Right to*

In *Austin*, the Court went further; it upheld a rule restricting a nonprofit corporation's independent expenditures as well as contributions, justified by the fact that all corporations both "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." 494 U.S. at 661, 110 S.Ct. at 1398; *see id.* at 663 n. 2, 110 S.Ct. at 1399 n. 2 (recognizing "the possible distortion of the political process *inherent* in independent expenditures from general corporate funds") (emphasis added). Because the Court found that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions," *id.* at 660, 110 S.Ct. at 1398, the Court concluded that preventing "corporate domination of the political process" was a sufficiently compelling interest to justify the burdens on a nonprofit corporation's First Amendment rights, even in the context of totally independent expenditures. *Id.* at 659, 110 S.Ct. at 1397.

Surely, then, the same concerns are sufficiently compelling where, as here, corporate wealth is deployed in an in-between form, i.e., spending that is not totally independent but rather entails some degree of coordination with the candidates. The majority protects the freedom of corporations to meet face-to-face with a candidate, in

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Work Comm., 459 U.S. at 210, 103 S.Ct. at 561. *See also Buckley*, 424 U.S. at 84, 96 S.Ct. at 665-66 (upholding disclosure rules that required even law-abiding PACs to keep records of independent expenditures as a prophylactic measure necessary for the FEC to be able to enforce the law's other requirements effectively).

order to secretly plan the content and presentation of voter guides that the corporation will distribute to the public. I believe this concern should be secondary to protecting the integrity of our electoral process. *See Buckley*, 424 U.S. at 66, 96 S.Ct. at 657. The government has a compelling interest in taking prophylactic measures to prevent the coercion and corruption that would arise if a corporation like MRTLC offered to provide valuable in-kind assistance (providing expensive advertising for free)[23] to a candidate on the condition that the candidate take the position the corporation demands, and to prevent the appearance of such coercion or corruption.

The FEC is legitimately concerned about the danger. The FEC regulation prohibiting unwritten contact with candidates was designed to foreclose the abuse that could potentially arise from a corporation like MRTLC *pressuring* a candidate to *amend* his or her position on an issue, on pain of losing this kind of substantial in-kind contribution.[24] According to the FEC, a prophylactic rule is

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[23] The candidate does not have to pay for publishing the "voter guide," which can nevertheless greatly benefit his or her campaign: the guide will highlight the candidate's prolife position (or the pro-choice position of his or her opponent) and will be mailed to voters who presumably share MRTLC's views on this issue. This could save the candidate a considerable sum to publicize his or her positions in a favorable light to a targeted group of voters to whom this issue is particularly important.

[24] Prior to *Buckley*, when contributors could give money to a campaign *either* through direct contributions or independent expenditures, they usually chose the direct route. But since the *Buckley* decision, which foreclosed that route (for expenditures beyond certain limits), they have had to find other ways to financially benefit the candidate's campaign by giving

needed so corporations do not induce candidates to change positions merely because they need the money to finance their campaigns, even if they do not actually agree with the change. If the question were the FEC's authority to regulate an organization offering a $20,000 *cash contribution* to a candidate if she would agree to change her position to one of support for the organization's position on a particular piece of legislation, there would be no question of the FEC's authority to regulate the organization. I see no reason why the result should not be the same if the organization offers instead $20,000 worth of pamphlets presenting the candidate's view on this issue in a favorable, rather than an unfavorable, light.

Consider the following scenario. An organization consults with a candidate regarding his or her plans or needs in the campaign, and then says to the candidate: "You have stated the position you believe in, but we disagree with it in certain respects. We plan to spend $20,000 to print voter guides and distribute them largely to persons in sympathy with our views. If you modify your position to be more like ours, our voter guides will tell people that you support our position and your opponent does not. If you don't modify your stand as we suggest, we will spend the money on voter guides which paint you in an unfavorable light."

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independently. "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45, 96 S.Ct. at 647.

The prophylactic measure required by the FEC rule is simply that discussions with candidates about the preparation of voter guides be in writing, and not oral. Non-written communications with candidates about voter guides present an opportunity for the kind of dangerous *quid pro quo* at the heart of the compelling justification that the Supreme Court has repeatedly relied upon in upholding the Act's restrictions on contributions and coordinated expenditures. "[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978). Unlike a written communication, an oral discussion "is not visible or otherwise open to public scrutiny. Often there is no witness other than the [parties to the conversation], rendering it difficult or impossible to obtain reliable proof of what actually took place." *Id.* at 466, 98 S.Ct. at 1924. Under the majority's position sustaining MRTLC's view, corporate voter guides "would be virtually immune to effective oversight and regulation."[25] *Id.* I agree with the FEC that the written-contact-only requirement "eliminates the possibility of unrecorded conversations that could entice or coerce a candidate to alter his or her positions in exchange for favorable treatment in a voting guide." FEC Brief at 31. Such coercion exemplifies the kind of distortion of our political process with "immense

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[25] The district court itself was "sympathetic to the argument that enforcement is more difficult if the FEC cannot prohibit all oral communications and make enforcement decisions on simple criteria easily applied to written questions and answers." 927 F.Supp. at 500.

aggregations of wealth" of which *Austin*, 494 U.S. at 660, 110 S.Ct. at 1397, and *Mass. Citizens*, 479 U.S. at 263, 107 S.Ct. at 630-31, would disapprove, and which the FEC may regulate with prophylactic measures like its written-contact-only requirement. I conclude that "[i]t therefore is not unreasonable, or violative of the Constitution, for [the FEC] to respond with what in effect is a prophylactic rule." *Ohralik*, 436 U.S. at 467, 98 S.Ct. at 1924.

The plaintiff relies heavily on *Mass. Citizens* ("*MCFL* "), 479 U.S. at 263-64, 107 S.Ct. at 630-31, which emphasized the difference between the type of corporation before the Court there and an ordinary, business-oriented corporation whose independent expenditures (even if not coordinated with a candidate to the extent these voter guides are) may be restricted without violating the First Amendment.[26] *Austin*, 494 U.S. at 660, 110 S.Ct. at 1397-98. It is true that *MCFL* exempts from FECA's general rule a "small" group of corporations that do not pose the same kind of threat to the electoral process, *MCFL*, 479 U.S. at 263-64, 107 S.Ct. at 630-31, because they do not have access to "vast reservoirs" of corporate wealth (among other factors), *Austin*, 494 U.S. at 661, 664, 110 S.Ct. at 1398, 1400. But the significant fact in *MCFL* was *not* that the plaintiff was a nonprofit ideological corporation: indeed, in *Austin*, the Court upheld

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[26] It is significant that the holding in *MCFL* was limited to an *as applied* analysis of the facts pertaining to the plaintiff before the Court. It did not extend to a facial challenge as the instant case purports to be.

the constitutionality of regulations restricting independent expenditures by a nonprofit ideological corporation. *Id.* at 659-60, 110 S.Ct. at 1397-98.

Just as in *Austin*, the instant case is distinguishable from *MCFL*. In *Austin*, "the Constitution [did] not require that [the plaintiff] be exempted from the generally applicable provisions" of the campaign finance law, because it "[did] not share [the three] crucial features" that justified the narrow *MCFL* exception. *Austin*, 494 U.S. at 662, 110 S.Ct. at 1398-99. In the instant case, MRTLC accepts contributions from for-profit business corporations and intends to continue doing so. MRTLC does not eschew those "vast reservoirs of capital." *Austin*, 494 U.S. at 661, 110 S.Ct. at 1398. This is the point on which the Chamber of Commerce in *Austin* differed "most greatly" from the plaintiff in *Mass. Citizens*. *Austin*, 494 U.S. at 664, 110 S.Ct. at 1400. The source of MRTLC's funds creates the potential that MRTLC will "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." *Id.* at 664, 110 S.Ct. at 1400 (quoting *Mass. Citizens*, 479 U.S. at 264, 107 S.Ct. at 631) (brackets in *Austin*). This would enable for-profit business corporations – themselves "barred from making independent expenditures directly," *Austin*, 494 U.S. at 673-74, 110 S.Ct. at 1405 (Brennan, J., concurring) – to "circumvent the Act's restriction [on corporate financing of election campaigns] by funneling money through [MRTLC's] general treasury." *Austin*, 494 U.S. at 664, 110 S.Ct. at 1400. *Cf. California Medical Ass'n v. FEC*, 453 U.S. 182, 197-99, 101 S.Ct. 2712, 2722-23, 69 L.Ed.2d 567 (1981) (plurality opinion) (danger of evasion of limits on contribution to

candidates justified prophylactic limitation on contributions to PACs).

Finally, the FEC's written-contact-only rule for preparing voter guides is *narrowly tailored* to address the governmental interest here. It does not stop corporations like MRTLC from communicating their views about abortion or about particular candidates to the public; nor does it stop them from communicating with candidates to lobby them to change their positions, as long as the lobbying is not done in the context of offering what could be the functional equivalent of an extremely valuable in-kind contribution; it does not even stop them from communicating with candidates to gain information about candidate positions to include in the corporation's voter guide. All it does is require the latter type of communication directly with candidates to be done in writing, for prophylactic reasons. I agree with the FEC that, in the context of this case, "oral conversations, unlike written questions, inherently provide an opportunity for prearrangement and coordination, while adding little or no additional information necessary to produce a voting guide." FEC Brief at 33.

In *Austin*, the Court found that a statute was "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views," where the statute permitted independent political expenditures through PACs but forbade such expenditures from general corporate treasury funds. 494 U.S. at 660, 110 S.Ct. at 1397-98. The Court concluded that the statute was not overinclusive merely because it imposed the same restrictions on small companies that did not "possess vast reservoirs of capital." *Id.*

at 661, 110 S.Ct. at 1398. The Court noted that *National Right to Work Comm.* had rejected a similar overinclusion argument, because "it is the *potential* for such influence that demands regulation." *Id.* (quotation omitted). The written-contact-only regulation is likewise sufficiently narrowly tailored.

I conclude that the FEC may construe a corporation's contact with candidates in the preparation of a voter guide as "coordination" with the candidates. Therefore the FEC may treat the expenditure of money on those voter guides as an in-kind contribution to the candidates. In this context, the need for a prophylactic rule is sufficient to justify the limited restriction imposed by the written-contact-only regulation.

I am mindful that MRTLC's challenge here is facial, not as-applied. MRTLC is not asking us to consider whether the written-contact-only rule is unconstitutional as applied to it. Therefore, I do not consider whether, if a full factual record were before us, MRTLC might be able to show that it is not in fact a conduit for corporate wealth. Thus, even if the regulation would be unconstitutional as applied to someone, a facial challenge like the present one must fail where even the plaintiff appears to exemplify a situation where the written-contact-only regulation may constitutionally be applied. *Cf. Austin*, 494 U.S. at 674 n. 4, 110 S.Ct. at 1405 n. 4 (Brennan, J., concurring).

Conclusion

I believe that the majority has misstated the thrust of the FEC's written-contact-only regulation. The issue is

not as simple nor as amenable to broad-brushed analysis as the majority thinks. It cannot be resolved without examining the evolution of Supreme Court case law, which the majority has ignored. Because, as I read the case law, we should uphold this prophylactic regulation, I respectfully dissent.

APPENDIX B

Robin CLIFTON and Maine Right to Life Committee, Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, Defendant.

Civil No. 96-66-P-H.

United States District Court,
D. Maine.

May 20, 1996.

Pro-life, nonprofit corporation brought suit against Federal Election Commission (FEC) challenging validity of regulations restricting corporation's contact with candidates for use in publishing candidate voting records and voter guides. The District Court, Hornby, J., held that corporation's contacting of candidates to obtain information used to publish voting records and voter guide was protected issue advocacy.

Declaratory judgment for plaintiff.

Daniel M. Snow, Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Portland, ME, James Bopp, Jr., Paul R. Scholle, Bopp, Coleson & Bostrom, Terre Haute, IN, for plaintiffs.

Steven Hershkowitz, Lawrence M. Noble, Richard B. Bader, Robert J. Bonham, Federal Election Commission, Washington, DC, for defendant.

MEMORANDUM DECISION

HORNBY, District Judge.

This is the third lawsuit brought by the Maine Right to Life Committee ("MRLC") against the Federal Election Commission ("FEC"). The other plaintiff is Robin Clifton, not a member of the MRLC, but an individual who receives and reads their publications. This time the MRLC challenges the FEC's new regulations (effective March 13, 1996) restricting contact or coordination between a corporation and a candidate when the corporation publishes candidate voting records or voter guides. 11 C.F.R. § 114.4(c)(4) & (5). In light of the upcoming June primary, the case has been expedited, the motions for temporary and preliminary injunctive relief have been consolidated into the hearing on the merits and the case is submitted on a stipulated record. The plaintiffs have now waived their initial request for injunctive relief because of the early availability of declaratory relief. I heard oral argument on May 10, 1996, and received supplemental briefs on May 15, 1996. These are my findings of fact and conclusions of law. *See* Fed.R.Civ.P. 52.

Facts

The material facts about the MRLC have not changed appreciably since my decisions in *Faucher v. FEC*, 743 F.Supp. 64 (D.Me.1990), and *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8 (D.Me.1996) ("*MRLC*"). The MRLC is a nonprofit membership corporation exempt from federal income tax under Internal Revenue Code § 501(c)(4). It has approximately 2,000 members. The MRLC engages

in various educational, social action and political activities in order to further its stated goals of "restoring protection to the right to life for unborn children, educating the public on the issue of abortion and promoting the sanctity of all innocent life." *See* Stipulation of Facts ¶ 5. It accepts donations from business corporations into its general fund. From that fund it publishes quarterly newsletters, voter guides and congressional voting records on pro-life issues. (MRLC also operates a separate segregated fund pursuant to 2 U.S.C. § 441b(2)(C), the activities of which are not involved in this challenge.)

In *Faucher,* I set forth the basis for my authority to review a challenge to the legality of FEC regulations under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C). 743 F.Supp. at 67-68. In *MRLC,* I set forth the reasons why the MRLC need not obtain an advisory opinion from the FEC before seeking declaratory relief and explained the deference ordinarily to be accorded FEC interpretations unless the United States Supreme Court has spoken. 914 F.Supp. at 10, 12-13. Those previous analyses apply here and need not be repeated. I turn therefore to the merits.

The Dispute

The controversy here involves corporate publication of voting records and voter guides. The regulations in question[1] impose explicit restrictions on the publication

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[1] The relevant subsections read:

(4) Voting records. A corporation or labor organization may prepare and distribute to the

of voting records and voter guides by corporations and labor unions.

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general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party. The decision on content and the distribution of voting records shall not be coordinated with any candidate, group of candidates or political party. (5) Voter guides. A corporation or labor organization may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization which is described in 26 U.S.C. 501(c)(3) or (c)(4), provided that the voter guides comply with either paragraph (c)(5)(i) or (c)(5)(ii)(A) through (E) of this section. The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.

(i) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

(ii)(A) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation,

Specifically, for publication of voting records, not only is express advocacy of the election or defeat of a clearly identified candidate or candidates forbidden (both sides agree that this is consistent with *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), but in addition the FEC demands that even in the absence of such express advocacy "[t]he decision on content and the distribution

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contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing;

(B) All of the candidates for a particular seat or office shall be provided an equal opportunity to respond, except that in the case of Presidential and Vice Presidential candidates the corporation or labor organization may choose to direct the questions only to those candidates who –

(1) Are seeking the nomination of particular political party in a contested primary election; or

(2) Appear on the general election ballot in the state(s) where the voter guide is distributed or appear on the general election ballot in enough states to win a majority of the electoral votes;

(C) No candidate may receive greater prominence in the voter guide other than participating candidates, or substantially more space for responses;

(D) The voter guide and its accompanying materials shall not contain an electioneering message; and

(E) The voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way to convey an electioneering message.

11 C.F.R. § 114.4(c)(4) & (5).

of voting records shall not be coordinated with any candidate, group of candidates or political party." 11 C.F.R. § 114.4(c)(4). The term "coordinated" is undefined.

The constraints on voter guide preparation are more severe. In addition to the acceptable prohibition of express advocacy of election or defeat of a clearly identified candidate or candidates, the FEC requires a corporation or union publishing a voter guide without any such advocacy to make a choice nevertheless: either (1) have no contact at all with any candidate or committee in preparing the guide – in that event the only other restriction is that at least two candidates be covered in the guide, 11 C.F.R. § 114.4(c)(5)(i); or (2) have contact, but only through written questions and written responses – in that event the voter guide must give each candidate the same prominence and substantially the same space for response, must contain no "electioneering message" (undefined but apparently not the same as "express advocacy," *see FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1023 n. 10 (10th Cir.1995), *cert. granted*, ___ U.S. ___, 116 S.Ct. 689, 133 L.Ed.2d 594 (1996)), and must not score or rate the candidates' responses "in such a way as to convey an electioneering message." 11 C.F.R. § 114.4(c)(5)(ii)(A), (C)-(E).

The MRLC is unwilling to submit to these restrictions, except for the prohibition on express advocacy of the election or defeat of a clearly identified candidate. The MRLC publishes voting records and voter guides from time to time with funds from its general treasury and wishes to do so in connection with Maine's upcoming June primary election. It wants, for example, to be able to contact a candidate or campaign office directly

and orally seek explanation of particular votes or statements and, if it chooses to communicate in writing, not be limited by the space, prominence and other relevant regulatory requirements. It maintains that the new restrictions exceed the FEC's statutory power as construed by the United States Supreme Court and that the very existence of these restrictions chills the MRLC's exercise of its First Amendment rights.

The FEC contends that its new regulations are within its power. The FEC finds authorization for its regulations in the Federal Election Campaign Act of 1971 ("FECA"), prohibiting "any corporation whatever" from making "a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative . . . are to be voted for, or in connection with any primary election . . . held to select candidates for any of the foregoing offices. . . . " 2 U.S.C. § 441b(a). Publication of the voting records and voter guides will concededly require the spending of money by the MRLC.

I observed in *MRLC* that because of the First Amendment the United States Supreme Court explicitly has narrowed FECA's very broad prohibition against corporate election-related spending to a prohibition on spending involving express advocacy of the election or defeat of a clearly identified candidate or candidates. 914 F.Supp. at 9; *see MCFL*, 479 U.S. at 249, 107 S.Ct. at 623, 93 L.Ed.2d at 551; *see also Buckley*, 424 U.S. at 80, 96 S.Ct. at 663, 46 L.Ed.2d at 723. The Court has ruled that spending for issue advocacy, on the other hand, cannot be stopped. *See MCFL, id.* This distinction between issue advocacy and express advocacy of the election or defeat of a clearly

identified candidate or candidates has been a continuing source of dissension between the MRLC and the FEC.

This case, however, presents a new twist. In *MCFL*, the Supreme Court struck down *expenditure* limitations except in cases of express advocacy but, as it had done in *Buckley*, generally approved the limits imposed on *contributions* to candidates. 479 U.S. at 259-60, 107 S.Ct. at 628-29, 93 L.Ed.2d at 557-58. The FEC argues that its new regulations are designed to deal with corporate expenditures that have been coordinated with the candidates or their campaign offices and that such coordination makes them "contributions" not subject to the First Amendment concerns of *Buckley* and *MCFL*. 60 Fed.Reg. 64,260, 64,260 (Dec. 14, 1995) ("New language has been added to 11 CFR 114.2, 114.3 and 114.4 to address the question of when coordination between a candidate and a corporation or labor organization will cause an activity to become a prohibited contribution.")[2] Indeed, at oral argument, the FEC's counsel asserted that the new regulations are defended only on the ground that the activity in question can properly be interpreted as a contribution, not an expenditure. The MRLC disagrees with this "contribution" characterization and argues that this is just one more attempt by the FEC to avoid the *Buckley* and *MCFL* holdings that restricted its authority over issue advocacy.

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[2] The FEC's justification for these new rules is best presented in its own "Explanation and Justification," which I have excerpted and attached. *See* Appendix.

ANALYSIS

Contributions to a candidate from a corporation's or union's general treasury funds can constitutionally be prohibited. That much is straightforward, for the governmental interests in preventing corruption or the appearance of corruption outweigh the First Amendment interests at stake. *Buckley*, 424 U.S. at 47, 96 S.Ct. at 648, 46 L.Ed.2d at 704; *MCFL*, 479 U.S. at 260, 107 S.Ct. at 629, 93 L.Ed.2d at 557-58; *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-98, 105 S.Ct. 1459, 1468-69, 84 L.Ed.2d 455, 469-70 (1985) ("*NCPAC*"). It is equally clear after *Buckley* and *MCFL* that corporate expenditures in connection with a federal election or primary *cannot* constitutionally be limited except when they are devoted to express advocacy of the election or defeat of a particular candidate or candidates. *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991); *see also MRLC*, 914 F.Supp. at 9. In other words, spending on issue advocacy – the only form of advocacy the Maine Right to Life Committee proposes to engage in here – cannot be limited. *Id.* The question is, what happens when a corporation preparing to publish a voting record or a voter guide as a form of issue advocacy contacts the candidate for information or other purposes? Does the publication then become a prohibited contribution?

In one section of the legislation, the FECA sets dollar limits on the amount of contributions, but does not prohibit them outright. 2 U.S.C. § 441a(a). For the purposes of these contribution limits, "contribution" is defined to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or

suggestion of, a candidate, his authorized political committees, or their agents," 2 U.S.C. § 441a(a)(7)(B)(i) – language that, the FEC argues, furnishes authority for what it has done here in the new regulation. Def.'s Mem. of Points and Authorities at 14 n. 7; Reply to Pl.s' Opp. at 5. That expansive definition for dollar-limited contributions, however, is explicitly limited by its terms to section 441a. 2 U.S.C. § 441a(a)(7).

A separate provision, section 441b, prohibits corporate and union contributions and expenditures altogether for presidential and congressional elections and primaries. It is the section upon which the new FEC regulations are based and it results from a long history of legislative enactments and amendments recounted by the Supreme Court in *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208-09, 103 S.Ct. 552, 559-60, 74 L.Ed.2d 364, 375-77 (1982); *Pipefitters v. United States*, 407 U.S. 385, 402-12, 92 S.Ct. 2247, 2257-63, 33 L.Ed.2d 11, 23-29 (1972); and *United States v. International Union (UAW-CIO)*, 352 U.S. 567, 570-87, 77 S.Ct. 529, 531-39, 1 L.Ed.2d 563, 566-75 (1957).[3] Section 441b has its own separate definition of the terms in question: "For purposes of this section . . . the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection

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[3] Difficulties with the distinction between contributions and expenditures for 441b have been apparent at least since 1944. *See International Union (UAW-CIO)*, 352 U.S. at 579-84, 77 S.Ct. at 535-37, 1 L.Ed.2d at 571-74.

with any election to any of the offices referred to. . . . " 2 U.S.C. § 441b(b)(2). The United States Supreme Court in *MCFL* went beyond that definition contained in section 441b and looked as well to the general definitions section of the FECA, which includes under "expenditure" "the provision of anything of value made 'for the purpose of influencing any election for Federal office. . . . ' " 479 U.S. at 245-46, 107 S.Ct. at 621, 93 L.Ed.2d at 548 (quoting 2 U.S.C. § 431(9)(A)(i)). As a result, the Court concluded that "441b was meant to proscribe expenditures in connection with an election" even if the payments are not made directly to candidates or campaign organizations, 479 U.S. at 246, 107 S.Ct. at 622, 93 L.Ed.2d at 549, so long as they are made "on behalf of candidates." 479 U.S. at 248, 107 S.Ct. at 623, 93 L.Ed.2d at 550. That is the statutory and interpretive language on which the FEC's new regulations must be based.[4]

The new regulations go far beyond the language of section 441b as interpreted by *MCFL*. 479 U.S. at 248, 107 S.Ct. at 623, 93 L.Ed.2d. at 550. Under the provisions for voter guides, the FEC test is not whether a corporation is engaging in issue advocacy "on behalf of" a candidate (a test *MCFL* would support), but whether it has had any "contact" with the candidate. The regulations permit unrestricted issue advocacy only if there is *no* contact, oral or written, with any candidate in connection with the voter guide. 11 C.F.R. § 114.4(c)(5)(i). Any oral contact

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[4] This language also differs from that now before the Supreme Court in *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, *cert. granted*, ___ U.S. ___, 116 S.Ct. 689, 133 L.Ed.2d 594 (1996) (construing 2 U.S.C. § 441a(d)(3)).

concerning the content of a voter guide – questions to clarify a candidate's position, for example – results in outright prohibition of corporate issue advocacy through use of the guide. *Id.* § 114.4(c)(5). Even written contact with candidates results in severe constraints on issue advocacy, *id.* § 114.4(c)(5)(ii), otherwise entitled to broad First Amendment protection under the teachings of *Buckley* and *MCFL*.

The voting record regulation comes closer to being within the FEC's authority because it states only that "[t]he decision on content and the distribution of voting records shall not be coordinated with any candidate. . . ." 11 C.F.R. § 114.4(c)(4). Coordination of *spending on behalf of* a candidate is within MCFL's interpretation of the scope of the 441b prohibition. But when it comes to voting records, what is coordination of a decision on content? A commonly used dictionary defines "coordinate" as "to combine in harmonious relation or action." *The Random House Unabridged Dictionary* 447 (2d ed. 1993). Does that prohibit discussion with the candidate of what a particular vote meant and a summary of the outcome in the published voting record? If there are three apparently inconsistent votes and the MRLC asks the candidate for an explanation and summarizes the explanation in the publication, is that prohibited coordination of a decision on content? These are exactly the types of issue advocacy undertaken by the MRLC and, as I understand the FEC's counsel's oral argument, such activities are indeed prohibited by the new regulations. But it is a distortion of the English language to say that they turn the MRLC's publication of the voter guide into spending "on behalf of" a candidate.

The FEC tries to find support for its contribution argument in language it extracts from *Buckley*, *NCPAC* and *MCFL* distinguishing independent expenditures from coordinated expenditures. In *Buckley*, for example, the Court dealt with FECA's expenditure limitations that took at least two forms: limitations on candidates or candidate organizations directly and limitations on other persons advocating for or against a candidate. *See* 424 U.S. at 187-95 app., 96 S.Ct. at 713-16, 46 L.Ed.2d at 782-87. The Court referred to the latter as "independent expenditures." 424 U.S. at 22, 45, 46-47 n. 53, 51, 96 S.Ct. at 636, 647, 648, 650, 46 L.Ed.2d at 689, 702, 703, 706. When confronted with the argument that these expenditures could be coordinated with a candidate (*e.g.*, a third party paying for media advertisements) so as to provide virtually the same value as a prohibited contribution, the Court pointed out that the same section of the Act defined expenditures "authorized or requested by the candidate" as prohibited contributions, 424 U.S. at 46-47 n. 53, 80, 96 S.Ct. at 648, 664, 46 L.Ed.2d at 703, 722-23, and characterized this category as covering "all expenditures placed in cooperation with or with the consent of a candidate. . . . " 424 U.S. at 78, 96 S.Ct. at 663, 46 L.Ed.2d at 721. The Court also sustained a separate $500 statutory limit on volunteers' individual expenses in contributing goods or services to a candidate. 424 U.S. at 36-37, 96 S.Ct. at 643, 46 L.Ed.2d at 697. The FEC argues that *Buckley* thereby permits it to prohibit expenditures unless they are completely "independent" of any candidate or

committee. But unlike the provisions discussed in *Buckley*, there is no language in the statutory provisions relating to section 441b's prohibition on corporate or union contributions that would support what the FEC has done.

The word "independent" did seem to gain more importance in *NCPAC*. There, the Court referred to expenditures as " 'independent' in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents," 470 U.S. at 490, 105 S.Ct. at 1465, 84 L.Ed.2d at 465, and referred to *Buckley* as striking down the limitation on "individuals' independent expenditures because we found no tendency in such expenditures, *uncoordinated with the candidate or his campaign*, to corrupt or to give the appearance of corruption." 470 U.S. at 497, 105 S.Ct. at 1468, 84 L.Ed.2d at 469-70 (emphasis added). Once again, however, the Court noted that coordinated expenditures were treated as contributions by specific statutory language, this time the language being that quoted above from section 441a – language specifically not applicable to the corporate contributions or expenditures here. 470 U.S. at 492, 105 S.Ct. at 1466, 84 L.Ed.2d at 466-67.

Finally, in *MCFL*, the Court again referred to "independent" spending or expenditures, but this time did not specify the particular sense in which it was using the term. *See, e.g.*, 479 U.S. at 241, 249, 251, 260, 262, 107 S.Ct. at 619, 623, 624, 629, 630, 93 L.Ed.2d at 546, 551, 552, 558, 559.

Thus, the FEC has taken the Supreme Court's discussion of statutory language that specifically does not apply

here and has used it to conclude that the First Amendment does not foreclose its new regulations. What that Supreme Court language did, however, was approve what Congress had done in other portions of FECA, not give that authority independently to the FEC. The FEC has neglected to find appropriate statutory authority for what it has done in interpreting section 441b.[5]

Even if I were to accept the FEC's argument that *Buckley's* discussion of the statutory language concerning coordination of individuals' spending and the limits on volunteers' expenses could be used to interpret the language of section 441b, *Buckley* talked only about prohibiting expenditures "authorized or requested by the candidate," interpreted at its broadest as "all expenditures placed in cooperation with or with the consent of a candidate." 424 U.S. at 46-47 n. 53, 96 S.Ct. at 648, 46 L.Ed.2d at 703. (*NCPAC* and *MCFL* are no different in this respect. *See* 470 U.S. at 498, 105 S.Ct. at 1469, 84 L.Ed.2d at 470; 479 U.S. at 248, 107 S.Ct. at 623, 93 L.Ed.2d at 550.) The FEC has gone far beyond "cooperation" or "consent" in these prohibitions of all contact and consultation in the

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[5] Contrary to the FEC's claim, *see* Defendant's Letter Brief at 2-3, the fact that FECA has defined "independent expenditure," 2 U.S.C. § 431(17), does not shed light on when an expenditure for issue advocacy can be treated as a contribution to a candidate. By definition the term "independent expenditure" is limited to express advocacy – "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate . . . ," *id.* – unlike the issue advocacy at stake here. Moreover, the term is not used to approve or prohibit spending, but only for reporting requirements, 2 U.S.C. § 434.

preparation of voter guides and the broad prohibition of content coordination for voting records.[6]

The FEC fundamentally has misinterpreted the Supreme Court's teachings. *Buckley* approved contribution limits because, "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20, 96 S.Ct. at 635, 46 L.Ed.2d at 688-89. The basis for this conclusion, as the Court took pains to point out, is that a contribution of money *to* a candidate is not direct communication but only an "undifferentiated, symbolic act." 424 U.S. at 21, 96 S.Ct. at 635, 46 L.Ed.2d at 689. Specifically, "[w]hile contributions may *result* in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves *speech by someone other than the contributor.*" 424 U.S. at 21, 96 S.Ct. at 636, 46 L.Ed.2d at 689

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[6] Likewise, even if section 441a's definition of "contribution" were relevant, the legislative history indicates that the definition was intended to distinguish "between independent expression of an individual's views and the use of an individual's resources to aid a candidate in a manner *indistinguishable in substance from the direct payment of cash to a candidate.*" S.Rep. No. 677, 94th Cong., 2d Sess. 31, 59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 974 (emphasis added). The regulations challenged here prohibit activities far beyond that which could be understood as a de facto payment of cash (*i.e.*, as asserted by the FEC's counsel at the hearing, even telephone calls to clarify the accuracy of a candidate's position for report in a voter guide fall within the literal prohibition).

(emphases added). But that specifically is not the type of spending, call it expenditure or contribution, at stake here in the MRLC's publication of voting records and voter guides. These publications are the MRLC's direct issue advocacy, not the candidate's. Nor is it the mere third-party billpaying for a candidate's media advertisements or a volunteer's incidental expenses that *Buckley* was talking about when it treated coordinated spending as a contribution under different statutory language. 424 U.S. at 46-47 n. 53, 96 S.Ct. at 647-48, 46 L.Ed.2d at 703. Here, both the disbursements and the speech are *direct political speech by the MRLC*, not by the candidate. They are thus at the heart of the Court's First Amendment concerns. *See* 424 U.S. at 14-23, 96 S.Ct. at 632-36, 46 L.Ed.2d at 684-90; *see also NCPAC*, 470 U.S. at 495-96, 105 S.Ct. at 1468, 84 L.Ed.2d at 469 ("[A] corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.").

Thus, there is no authority for the FEC's new regulations on voting records and voter guides. The statute itself (section 441b) does not make corporate expenditures, occurring after contact with a candidate, into contributions. *MCFL* broadens the statutory definition somewhat to treat expenditures made "on behalf of" a candidate as within the statute, 479 U.S. at 248, 107 S.Ct. at 623, 93 L.Ed.2d at 550, but that still is a far cry from what the FEC has prohibited here. And the Supreme Court's First Amendment concerns run counter to the FEC's new prohibitions. I am sympathetic to the argument that enforcement is more difficult if the FEC cannot prohibit all oral communications and make enforcement

decisions on simple criteria easily applied to written questions and answers, but as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate.[7]

In an effort to uphold the regulations, I have considered two other ways in which they might survive. First, the FEC could have advanced the regulations only as safe-harbor provisions. In other words, any corporation or labor union that satisfied the conditions of subsections 114.4(c)(4) or (5), as the case may be, could have been guaranteed that it was in compliance, while all others would have faced the more ambiguous language of the statute and the caselaw as to when spending becomes a contribution instead of an expenditure. The MRLC then would have no legitimate challenge, because all it seeks is the right to be judged under the statute and caselaw in any event. But the FEC's counsel expressly disclaimed this interpretation at oral argument and the FEC's "Explanation and Justification" also make clear that it is not the FEC's intent. 60 Fed.Reg. at 64,263, 64,269; *see* Appendix.

Second, the regulatory phrases that instruct a corporation not to "coordinate[ ]," 11 C.F.R. § 114.4(c)(4), or "contact or in any other way act in cooperation, coordination, or consultation with . . . ," *id.*, § 114.4(c)(5)(i) & (ii), a

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[7] In light of my decision I do not reach the MRLC's separate argument that the phrase "electioneering activity" in the voter guide regulation is unconstitutionally vague.

candidate about the publications could have been given a narrowing construction that would have limited them to activity equivalent to actions "on behalf of" a candidate, consistent with *MCFL*. 479 U.S. at 248, 107 S.Ct. at 623, 93 L.Ed.2d at 550. It is clear, however, from the FEC's "Explanation and Justification" and its counsel's written and oral argument that such is not the FEC's position. *See, e.g.*, Reply to Pl.s' Opp. at 2-3 (stating that even information requests must, "as a prophylactic measure," be in writing); 60 Fed.Reg. at 64,267, 64,269. Instead, the FEC's purpose is to establish a bright-line test measured by the plain language of these terms in all their breadth. Without narrowing, the regulations are beyond the FEC's authority.

Accordingly, the plaintiffs' request for declaratory judgment is GRANTED as follows: It is hereby ADJUDGED that the regulations found at 11 C.F.R. § 114.4(c)(4) & (5) are invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, and by the United States Court of Appeals for the First Circuit in *Faucher*, 928 F.2d 468, because they restrict issue advocacy in connection with expenditures. The Clerk shall enter judgment accordingly.

SO ORDERED.

APPENDIX

The FEC's "Explanation and Justification" for its new rules are as follows:

> The revised regulations in 11 CFR 114.1(a)(1) and (a)(2) recognize that the *MCFL* decision necessitates certain distinctions between the terms "contribution" and "expenditure." The previous rules had treated these terms as coextensive. The distinction arises because the Court read an express advocacy standard into the 2 U.S.C. 441b definition of expenditure. However, payments which are coordinated with candidates constitute expenditures and in-kind contributions to those candidates even if the communications do not contain express advocacy. *See* AO 1988-22.
>
> One commentator urged the Commission to continue to interpret the term "contribution or expenditure" to cover the same disbursements. The comment argued that the *MCFL* decision applies equally to contributions and expenditures. The Commission disagrees with this interpretation of MCFL, given that the case only involved the issue of whether corporate expenditures were made. In *MCFL*, the parties did not raise and the Supreme Court did not resolve, the factual question of whether corporate contributions had been made by MCFL, Inc. However, the MCFL Court reaffirmed the First Amendment distinction between independent expenditures and contributions, which was recognized in the *Buckley* opinion. In *Buckley*, the Supreme Court generally struck down the Act's limitations on independent campaign expenditures by individuals and organizations (*Buckley*, 424 U.S. at 39-51), but upheld the constitutionality of the

Act's restrictions on contributions to candidates. *Id.* at 23-38. Subsequently, the Court stated in *NCPAC* that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Federal Election Commission v. National Conservation PAC*, 470 U.S. 480, 497 (1985). Similarly, the Court indicated that "a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." *Id*, [sic] at 495-96. In light of this judicially-recognized distinction, the final version of section 114.1(a)(1) and (a)(2) is being modified to recognize that the terms "contribution" and "expenditure" are not coextensive.

* * *

For the reasons explained above, the express advocacy standard in the revised rules applies to independent expenditures, but not contributions. The prohibition against contributions made by corporations and labor organizations in connection with federal elections remains unaffected by *MCFL*. . . .

* * *

. . . In *Buckley v. Valeo*, the Supreme Court made a distinction between independent expenditures and contributions. The Court observed, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure

with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. Thus, *Buckley* could be interpreted to prohibit all contacts with candidates. However, the NPRM [Notice of Proposed Rulemaking] recognized that it is justifiable to allow some forms of contact to preserve the previous range of permissible activity, such as sponsoring candidate appearances. The prohibition against corporate contributions was expressly reaffirmed in *MCFL*. 479 U.S. at 260. Therefore, the NPRM sought to draw a distinction between permissible contacts with candidates which are necessary to conduct these activities, and more extensive coordination that will result in in-kind contributions in some circumstances. . . .

* * *

[Some commenters] pointed out that this was an area not addressed by the *MCFL* decision, and that it appeared as though the Commission was trying to find a way to impose new requirements that would be at least as restrictive as the former partisan/nonpartisan standard. . . .

. . . In response to these concerns, new section 114.2(c) has been rewritten to clarify what types of contacts with candidates are considered impermissible coordination, and what types are permissible. . . . [A] corporation or labor organization that engages in election-related activities directed at the general public must avoid most forms of coordination with candidates, as this

will generally result in prohibited in-kind contributions, and will compromise the independence of future communications to the general public. For example, a prohibited in-kind contribution would result if a voter guide is prepared and distributed after consulting with the candidate regarding his or her plans, projects or needs regarding the campaign. . . .

* * *

. . . [T]he Commission has substantially revised the concept of coordination in section 114.4. The *MCFL* decision addressed the scope of the FECA's prohibition against corporate expenditures. However, the prohibition against corporate contributions was expressly reaffirmed in *MCFL*. 479 U.S. at 260. Accordingly, the final rules which follow preserve the statutory ban on contributions made by corporations and labor organizations in connection with federal elections. Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate or union communications with candidates, except for certain activities described in this section and 11 CFR 114.3 . . .

Under revised section 114.4(a), communications to the general public . . . that are based on information about a candidate's plans, projects and needs provided by the candidate or the candidate's agent are considered coordinated, and hence, in-kind contributions. Such coordination may also jeopardize the independence of subsequent communications to the general public. . . .

* * *

5. Voting Records

* * *

. . . [N]ew language has been included to indicate that the decision as to the content of a voting record also may not be coordinated with a candidate or political party. . . .

6. Voter Guides

* * *

. . . [T]he Commission has substantially revised the final rules to provide a choice of two different ways of issuing and distributing voter guides, which are intended to comport with *Faucher*. . . .

* * *

The first type of permissible voter guide, which is described in paragraph (c)(5)(i), is one that is prepared and distributed without any contact, cooperation, coordination or consultation with the candidate, the candidate's campaign or the candidates's agent. Hence, the information regarding the candidate's position on issues must be obtained from news articles, voting records, or other non-campaign sources. . . . The second type of permissible voter guide, which is described in paragraph (c)(5)(ii), is subject to further restrictions because it contemplates limited written contact with the candidate's campaign committee to obtain the candidate's responses to issues included in the voter guide. . . .

The *Faucher* decision does not mandate eliminating all restrictions on voter guides save for the prohibition on express advocacy.

60 Fed.Reg. at 64,262-63, 64,267, 64,269.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 96-1812

ROBIN CLIFTON, ET AL.,
Plaintiffs, Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant, Appellant.

JUDGMENT

Entered: June 6, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now ordered, adjudged and decreed as follows: The district court's judgment is modified in the manner specified in the opinion filed this date, and the case is remanded for further proceedings consistent with the opinion filed this date.

By the Court:

WILLIAM H. NG
Clerk.

[cc: Messrs: Kolker and Bopp]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 96-1812

ROBIN CLIFTON and
MAINE RIGHT TO LIFE COMMITTEE, INC.,
Plaintiffs, Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant, Appellant.

ORDER OF THE COURT

BEFORE

Bownes, *Senior Circuit Judge*,
Selya and Boudin, *Circuit Judges*.

Entered: June 27, 1997

Upon consideration of the Petition for Rehearing of the Plaintiffs-Appellees,

It is ordered that said petition is denied.

By The Court

WILLIAM H. NG
WILLIAM H. NG, Clerk

[cc: Messrs. Kolker, Bader, Noble, Bonham, Hershkowitz, Schollew, Bopp & Snow]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 96-1812

ROBIN CLIFTON, ET AL.,
Plaintiffs, Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant, Appellant.

Before

Torruella, *Chief Judge*, Bownes, *Senior Circuit Judge*, Selya, Boudin, Stahl and Lynch, *Circuit Judges*.

ORDER OF COURT

Entered: August 8, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Vincent F. Flanagan,
Acting Clerk.

By JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Kolker and Bopp]

APPENDIX F

2 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall –

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations

* * *

APPENDIX G

2 U.S.C. § 441b(a).

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

* * *

APPENDIX H

11 C.F.R. § 114.4

(c)(4) *Voting records.* A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party. The decision on content and the distribution of voting records shall not be coordinated with any candidate, group of candidates or political party.

(c)(5) *Voter guides.* A corporation or labor organization may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization which is described in 26 U.S.C. 501(c)(3) or (c)(4), provided that the voter guides comply with either paragraph (c)(5)(i) or (c)(5)(ii)(A) through (E) of this section. The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.

(i) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

(ii)(A) The corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing:

(B) All of the candidates for a particular seat or office shall be provided an equal opportunity to respond, except that in the case of Presidential and Vice Presidential candidates the corporation or labor organization may choose to direct the questions only to those candidates who –

(1) Are seeking the nomination of a particular political party in a contested primary election; or

(2) Appear on the general election ballot in the state(s) where the voter guide is distributed or appear on the general election ballot in enough states to win a majority of the electoral votes;

(C) No candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses;

(D) The voter guide and its accompanying materials shall not contain an electioneering message; and

(E) The voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as to convey an electioneering message.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ROBIN CLIFTON and MAINE RIGHT TO LIFE COMMITTEE, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil No. 96-66-P-H

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiffs Robin Clifton and Maine Right to Life Committee ("MRLC") and Defendant Federal Election Commission ("Commisson" or "FEC"), through their undersigned counsel, that, for the purpose of this litigation only, the following statements of fact are deemed true, subject to the right of either party to submit or introduce evidence regarding these or other facts not inconsistent with this Stipulation:

1. Plaintiff Maine Right to Life Committee ("MRLC") is a statewide, nonprofit, membership corporation (with approximately 2000 members) incorporated in the State of Maine with affiliated local chapters throughout the State.

2. MRLC is exempt from Federal Income Tax under 26 U.S.C. § 501(c)(4). MRLC operates a separate segregated fund pursuant to 2 U.S.C. § 441b(b)(2)(C) and has done do [sic] for several years.

3. Plaintiff Robin Clifton is an adult citizen of the United States, a resident of the State of Maine, and an individual eligible to vote in elections for President of the United States. Plaintiff Clifton is not a member of Plaintiff MRLC.

4. Defendant Federal Election Commission is an agency of the United States of America.

5. Plaintiff MRLC engages in various educational, social action and political activities in order to further its stated goals of restoring protection to the right to life for unborn children, educating the public on the issue of abortion and promoting the sanctity of all innocent life.

6. In the past, Plaintiff MRLC has accepted donations from business corporations and intends to continue to accept such donations in the future.

7. From its general fund, MRLC publishes a quarterly newsletter, Life for ME. The newsletter is made available to MRLC's members and to the general public.

8. Before federal elections, MRLC surveys federal candidates through written questionnaires to determine their positions on pro-life issues. An example of such a questionnaire, captioned "NATIONAL RIGHT TO LIFE COMMITTEE CONGRESSIONAL CANDIDATE QUESTIONNAIRE," is attached hereto as Exhibit A. In the left-hand column, such questionnaire contains the survey questions which MRLC sent to federal candidates prior to

the November, 1988 election. Below the questions, the candidates' responses are set forth in a tabular format. This document was distributed to MRLC's members and to the general public by inclusion in MRLC's newsletter and through other means. Attached as Exhibits H, I and J are candidate. surveys used in the 1990, 1992 and 1994 elections respectively. Such candidate surveys were obtained from the National Right to Life Committee but used by MRLC for its own purposes. NRLC mailed such surveys to candidates for federal office in Maine and received the replies from such mailing.

9. In the event that a candidate does not respond to MRLC's candidate survey in writing or where a clarification of the candidate's position is needed, MRLC may contact the candidate (or his or her agent) orally in order to get such response or clarification. The results are published in MRLC's voter guides which are paid for out of MRLC's general treasury. Such voter guides set forth the positions of federal candidates on a range of pro-life issues. Such voter guides are distributed to MRLC's members and to the general public, usually, but not exclusively, in connection with MRLC's newsletter.

10. The "1994 MRLC CANDIDATE SURVEY," attached hereto as Exhibit B, is a voter guide which was published as part of MRLC's newsletter and distributed to MRLC's members and to the general public prior to the November, 1994 election. Such voter guide summarized the positions taken by federal candidates on pro-life issues but did not print the questions which had been asked of the candidates. However, upon request, MRLC made copies of a particular candidate's questionnaire available to its members and the general public.

11. MRLC does not necessarily give all candidates for a particular federal office an opportunity to respond to its surveys; nor is every candidate for a given federal office necessarily represented in a published voter guide. In the past, candidates have been excluded from consideration. For example, the primary election voter guide, included in the May, 1994 edition of Life for ME, attached hereto as Exhibit C, did not include Shawn Hallisey, a Democratic candidate for the Second Congressional District. In addition, the "1994 MRLC CANDIDATE SURVEY," attached hereto as Exhibit B, did not include independent congressional candidate John Michael.

12. In the past, MRLC's voter guides have not used phrases such as "vote for the President," reelect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate," "defeat," "reject the incumbent," or any similar phrases. Nor have MRLC's voter guides used phrases such as "vote pro-life" followed by a listing of clearly identified candidates described as being pro-life. However, candidates are not necessarily given an equal amount of space in MRLC's voter guides. One candidate may receive greater prominence or substantially more space for responses that another candidate. For example, in a voter guide which appeared in the October, 1990 edition of Life for ME, attached hereto as Exhibit D, David Emery received more than four times as much space as Thomas Andrews, his opponent for a seat in the United States House of representatives. In the same voter guide, Patrick McGowan received approximately twice as much space as his opponent, Olympia Snowe.

13. A primary election, including elections for federal office, is scheduled for the State of Maine on June 11, 1996.

14. In October, 1994 Plaintiff MRLC published and distributed to its members and the general public an edition of Life for ME, containing the "1994 MRLC CANDIDATES SURVEY," which is attached hereto as Exhibit B. In connection with the primary election in the State of Maine scheduled for June 11, 1996, MRLC intends to publish and distribute to its members and the general public a voter guide substantially similar to the "1994 MRLC CANDIDATE SURVEY." MRLC intends to pay the publication costs for same out of its general funds.

15. MRLC wishes to distribute its anticipated voter guide at least one month prior to the election.

16. In the event that one or more candidates fail to respond timely to MRLC's questionnaire, or in the event that MRLC needs clarification of responses, MRLC intends to contact the candidate(s) or their agent(s) orally in order to acquire the necessary information.

17. MRLC intends to summarize the candidates' responses to the questionnaires in such a way as to reflect accurately their positions on pro-life issues, but without regard to whether any candidate receives substantially more space or greater prominence than another. Not all candidates surveyed will necessarily be included in the published voter guide. MRLC intends to make copies of the individual candidate questionnaires available to its members and to the general public upon request.

18. In past voter guides, MRLC has used the word "Yes" or the letter "Y" in a voter guide to indicate that a candidate's response to a question on a particular issue is in agreement with the National Right to Life Committee's position on that question. See "NATIONAL RIGHT TO LIFE COMMITTEE CONGRESSIONAL CANDIDATE QUESTIONNAIRE," attached hereto as Exhibit A. In the voter guide projected in connection with the June 11, 1996 primary election, MRLC wishes to exercise is option to score or rate the candidates' responses in the same or similar fashion.

19. From time to time, MRLC publishes voting records which documents positions taken by members of the United States Congress on pro-life issues. Some voting records are paid for out of MRLC's general fund and are distributed to MRLC's members and to the general public. The purpose of such voting records is to inform and educate MRLC's members and the general public on abortion-related issues and to give them an opportunity to contact their legislators. In the past, neither MRLC's voting records nor any communications distributed with them have expressly advocated the election or defeat of any clearly identified candidate, group of candidates or candidates of a clearly identified political party.

20. MRLC's voting records generally contain the names, addresses and telephone numbers of the member of Congress, the district represented (if applicable), and a characterization of the member's past voting record on abortion-related legislation. In addition, MRLC makes available upon request a listing of Congressional roll call votes. See "YOUR LEGISLATORS AND HOW THEY VOTE," attached hereto as Exhibit E. This voting record

was prepared and distributed to MRLC's members and to the general public in mid 1995. See also "YOUR LEGISLATORS AND THEIR VOTES," attached hereto as Exhibit F. This voting record was prepared and distributed to MRLC's members and to the general public in 1991.

21. In the preparation of the voting record entitled "YOUR LEGISLATORS AND HOW THEY VOTE," Christopher Coughlan, Executive Director of MRLC, contacted the office of U.S. Rep. James Longley, Jr. in July, 1995 to request clarification concerning several abortion-related votes made by the Representative. Mr. Coughlan spoke with a member of the Congressman's staff. Mr. Coughlan wished to know how Rep. Longley had voted on particular pieces of legislation as well as an explanation of those votes. In particular, Mr. Coughlan was interested in information pertaining to votes concerning abortion funding. Based in part on that conversation, Mr. Coughlan characterized Rep. Longley's position on abortion-related issues in the published voting record as a "mixed voting record."

22. Representative Longley is a candidate for reelection in 1996.

23. MRLC cannot predict when the need to publish a voting record may arise. However, MRLC wishes to continue to publish and distribute voting records of members of Congress whenever the need to do so arises. In so doing, MRLC wishes to be able to exercise its right to communicate with candidates and/or their agents in essentially the same manner described above with respect to Rep. Longley. The purpose of such communications would be to acquire any information or clarification

which may be necessary for an accurate characterization of such candidates' voting records with regard to pro-life issues. The information garnered in such communications would thus be utilized in determining the content of future voting records.

24. The FEC has promulgated regulations at 11 C.F.R. § 114.4(c)(5) and 11 C.F.R. § 114.4(c)(4) which govern the manner in which corporations must prepare voter guides and voting records to be distributed to the general public rather than to the corporation's own stockholders, executives, administrative employees or members and that are financed with corporate treasury funds. The regulations became effective on March 13, 1996. A copy of said regulations is attached hereto as Exhibit G.

25. MRLC has accepted donations from business corporations in the past and intends to continue to do so.

26. As a result of the regulations at 11 C.F.R. § 114.4(c)(4) and 11 C.F.R. § 114.4(c)(5), if Plaintiff MRLC were to produce voter guides and/or voting records in accordance with its past practice and future intentions as outlined in this stipulation, the organization could be subjected to investigative and/or enforcement proceedings initiated by the FEC.

27. The FEC has initiated enforcement proceedings against alleged violators of the FECA in the past, although the Commission exercises prosecutorial discretion in determining which cases to pursue.

28. MRLC believes that the regulations at issue herein are invalid as in excess of the FEC's statutory

authority, and unconstitutional, and therefore, cannot be legally enforced.

29. But for the FEC's promulgation of the regulations, MRLC would publish voter guides financed by corporate treasury funds in anticipation of the June 11, 1996 primary election. However, MRLC fears that the FEC will attempt to enforce the regulations against it, thereby subjecting it to the burden and expense of defending itself and the potential risk of severe penalties in the event that the regulations are held to be valid. Therefore, since the effective date of the voter guide regulations, MRLC has not published a voter guide financed by corporate treasury funds to be distributed beyond its membership and will not do so pending the outcome of the instant litigation. In addition, since the effective date of the voting record regulations, MRLC has not published a voting record financed by corporate treasury funds to be distributed beyond its membership and will not do so pending the outcome of the instant litigation.

30. Plaintiff Clifton has obtained voter guides and voting records from MRLC in the past and wishes to continue receive [sic] them in the future, but does not wish to become a member of MRLC. The publications she wishes to receive include voter guides which MRLC plans to publish in anticipation of the June 11, 1996 primary election in the State of Maine and voting records which MRLC may decide to publish at any given time. However, because Plaintiff MRLC has suspended publication of its voter guides and voting records pending the outcome of this litigation, Plaintiff Clifton will be unable to receive such voter guides and voting records.

31. The Commission has not found that MRLC's prior voter guides or voting records violated the Federal Election Campaign Act, 2 U.S.C. § 431 et seq., and has never instituted an enforcement proceeding regarding any publications by MRLC.

32. Plaintiffs have not requested an advisory opinion from the Commission concerning the application of new 11 C.F.R. §§ 114.4(c)(4)(5) to any proposed activity by Plaintiffs.

Respectfully submitted,

DATED: April 10, 1996

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Supreme Court, U.S.
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No. 97-786

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBIN CLIFTON
AND MAINE RIGHT TO LIFE COMMITTEE, INC.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The instant case involves a facial challenge brought by petitioners to a regulation promulgated by the Federal Election Commission. The regulation establishes standards for determining the propriety of "voter guides" disseminated by corporations and labor unions. The district court held that the regulation is invalid in its entirety. The court of appeals resolved most of the disputed issues in petitioners' favor, holding that the bulk of the regulation is unauthorized by the governing statute and therefore invalid. The court remanded the case to the district court, however, to determine whether one provision of the regulation is severable from the rest of the rule and, if so, whether that provision is valid. This case presents the following question:

Whether the court of appeals committed any error warranting this Court's review in remanding this case to the district court for further proceedings concerning one aspect of the challenged regulation, rather than affirming the judgment of the district court in its entirety.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	10
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	11
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2
California v. *Rooney*, 483 U.S. 307 (1987)	10
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)	3, 9
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	6
Virginia Military Institute v. *United States*, 508 U.S. 946 (1993)	11

Constitution, statutes and regulations:

U.S. Const. Amend. I	5, 9
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*	2
2 U.S.C. 431(8)(A)	2
2 U.S.C. 431(9)(A)	2
2 U.S.C. 431(17)	3
2 U.S.C. 441a(a)(7)(B)(i)	3
2 U.S.C. 441b	3, 9
2 U.S.C. 441b(a)	2

Regulations—Continued: Page

11 C.F.R.:
Section 114.4(c)(5)(i) 4
Section 114.4(c)(5)(ii)(B) 4
Section 114.4(c)(5)(ii)(C) 4
Section 114.4(c)(5)(ii)(D) 4, 5
Section 114.4(c)(5)(ii)(E) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-59) is reported at 114 F.3d 1309. The opinion of the district court (Pet. App. 60-83) is reported at 927 F. Supp. 493.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1997. Petitions for rehearing were denied on June 27, 1997, and August 8, 1997. Pet. App. 85-87. The petition for a writ of certiorari was filed on November 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, provides that "[i]t is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

The Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall

be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).[1]

2. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court construed and clarified the scope of the statutory ban on corporate campaign expenditures. First, the Court held that an independent expenditure "must constitute 'express advocacy' [of the election or defeat of an identified candidate] in order to be subject to the prohibition of [2 U.S.C.] § 441b." *Id.* at 249. Second, the Court held that MCFL itself was entitled to a narrow, constitutionally based exception to the statutory bar, even though it had engaged in "express advocacy." The Court explained that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *Id.* at 264. Because those features "essential to [the Court's] holding" obviated the concerns underlying Section 441b, the Court concluded that corporations with those three features "may not constitutionally be bound by § 441b's restriction on independent spending," *id.* at 263-264,

---

[1] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

even with respect to payments made for express advocacy of the election or defeat of identified candidates.

3. In 1995, the Federal Election Commission (FEC or Commission) promulgated a regulation describing the circumstances under which corporate or union disbursements for "voter guides" will be regarded as "coordinated" with a candidate, and therefore as unlawful "contributions." Essentially, the regulation establishes two alternative methods by which the corporation or union may show that its disbursements are not coordinated with a candidate.

First, the organization may refrain from all contact with the candidate or his agents "regarding the preparation, contents and distribution of the voter guide." 11 C.F.R. 114.4(c)(5)(i). If the organization satisfies that requirement, the only limitation on the permissible contents of the voter guide is that the guide may not "expressly advocate the election or defeat of one or more clearly identified candidate(s) * * * of any clearly identified political party." *Ibid.* Alternatively, the corporation or labor union may submit written questions to, and receive written responses from, the candidates or their agents. If the organization engages in such contact, it must adhere to several other requirements. The organization must afford all candidates for a given office "an equal opportunity to respond," 11 C.F.R. 114.4(c)(5)(ii)(B); "[n]o candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses," 11 C.F.R. 114.4(c)(5)(ii)(C); "[t]he voter guide and its accompanying materials shall not contain an electioneering message," 11 C.F.R. 114.4(c)(5)(ii)(D); and "[t]he voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as

to convey an electioneering message," 11 C.F.R. 114.4(c)(5)(ii)(E).

4. Petitioners brought a facial challenge to the regulatory provisions described above. The district court held that the regulation was not authorized by the FECA and was therefore invalid. Pet. App. 60-83. In the district court's view, the regulation placed impermissible limitations on issue advocacy by corporations and unions. The court concluded that "[a]ny oral contact concerning the content of a voter guide—questions to clarify a candidate's position, for example—results in outright prohibition of corporate issue advocacy through use of the guide." *Id.* at 70-71. "Even written contact with candidates," the court stated, "results in severe constraints on issue advocacy [that is] otherwise entitled to broad First Amendment protection under" this Court's precedent. *Id.* at 71 (citation omitted).

The district court noted that it was "sympathetic to the argument that enforcement is more difficult if the FEC cannot prohibit all oral communications and make enforcement decisions on simple criteria easily applied to written questions and answers." Pet. App. 76-77. The court concluded, however, that, "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate." *Id.* at 77. Apparently believing that the regulatory ban on any "electioneering message" in corporate or union voter guides disseminated after written contact with the candidate (see 11 C.F.R. 114.4(c)(5)(ii)(D)) was inseverable from the other challenged provisions, the court

declined to reach petitioners' challenge to that ban. See Pet. App. 77 n.7. The court therefore held the regulation to be invalid in its entirety. *Id.* at 78.

5. The court of appeals modified the district court's judgment and remanded the case for further proceedings. Pet. App. 1-59. The court observed that petitioner Maine Right to Life Committee, Inc. (Maine Committee), unlike the corporation involved in *MCFL*, accepts contributions from other corporations. *Id.* at 8. The court regarded it as "unclear what the Supreme Court would say about the existence or extent of a constitutional right of campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee." *Ibid.* The court concluded, however, that it need not resolve that question. *Id.* at 9. It explained that, in its view, "the two main FEC rules at issue"—*i.e.*, the ban on oral contacts with candidates and the equal prominence requirement that applies where the corporation has had written contacts with the candidate—"curtail constitutional rights that corporations unquestionably do possess." *Ibid.*

Apart from the impact of those requirements on a corporation's issue advocacy, the court viewed the regulation as impinging on two separate constitutional rights. First, the court regarded the "equal prominence" requirement as inconsistent with the principle that, "where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write." Pet. App. 9 (citing *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)). Second, the court found the "written contact" requirement to be "patently offensive to the First Amendment in a different aspect: it treads heavily

upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." *Id.* at 12. The court did not squarely hold that the FEC regulation is unconstitutional, or that Congress would lack authority to enact an equivalent rule. Rather, relying on the "long tradition of construing statutes narrowly to avoid constitutional issues," it stated that, "[e]ven if the rules are otherwise 'reasonable,' we do not take Congress to have authorized rules that sacrifice First Amendment interests." *Id.* at 15.

The court of appeals expressed uncertainty, however, whether (as the district court had apparently assumed) the restriction on "electioneering messages" is inseverable from the "equal prominence" and "written contact" rules. See Pet. App. 18 (stating that "an argument can be made that the electioneering message ban, if valid, can stand on its own two feet"). The court also indicated that it was uncertain as to the meaning of the phrase "electioneering message" and its relation to the concept of "express advocacy." *Id.* at 17. The court stated that it regarded the parties' briefing of that question as "perfunctory," *ibid.*, and that it "ha[d] no intention of trying to resolve any of the issues thus implicated," *id.* at 18. The court of appeals therefore remanded the case to the district court to determine whether the "electioneering message" restriction is severable from the other challenged provisions and, if so, whether the restriction is valid. *Ibid.*[2]

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[2] Judge Bownes dissented, stating that he regarded the challenged regulatory provisions as reasonable prophylactic

ARGUMENT

Petitioners substantially prevailed in this case, obtaining an appellate decision that declared invalid the bulk of the Commission's voter guide regulation. Indeed, petitioners' only quarrel with the court of appeals' judgment is that the court remanded the case to the district court for further consideration of an issue that the court of appeals believed to have been briefed in a "perfunctory" manner. Because petitioner prevailed on the issues finally resolved by the court of appeals, and because of the current interlocutory posture of the remaining portion of the case, the petition should be denied.

1. The court of appeals declared invalid (see Pet. App. 18-19) the "written contact" and "equal prominence" requirements of the Commission's voter guide regulation—provisions that the court regarded (*id.* at 9) as "the two main FEC rules at issue" in this case. In the course of its opinion, the court made two assertions with which petitioners disagree. First, the court characterized this Court's decision in *MCFL* as "recogniz[ing] a First Amendment right to issue advocacy[] on behalf of a nonprofit corporation" that, *inter alia*, refused to accept contributions from business corporations or labor unions. *Id.* at 7. Second, the court regarded it as "unclear what the Supreme Court would say about the existence or extent of a constitutional right of campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee." *Id.* at 8. Petitioners, by contrast, read this Court's decisions as squarely holding that corporate disbursements for campaign-related com-

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rules designed to guard against both the fact and appearance of corruption in electoral campaigns. Pet. App. 19-59.

municative activities "are protected against governmental infringement under the First Amendment unless they constitute 'express advocacy' of the election or defeat of a clearly identified candidate." Pet. 5-6.

Any imprecision in the court of appeals' opinion does not warrant this Court's review.[3] The court

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[3] The Court in *MCFL* held, as a matter of statutory construction, that the independent corporate "expenditures" prohibited by 2 U.S.C. 441b are limited to disbursements made for express advocacy of the election or defeat of identified candidates. See 479 U.S. at 248-249. Thus, even if a corporation does not qualify for the "*MCFL* exemption" (see pp. 3-4, *supra*), Section 441b does not prohibit it from making independent disbursements for campaign-related speech, so long as that speech does not include "express advocacy" of particular electoral results. Although the *MCFL* Court's construction of the statute was clearly informed by constitutional concerns, see 479 U.S. at 248-249, the Court did not squarely hold that the express advocacy standard is constitutionally compelled. We therefore agree with the court of appeals that this Court has not definitively resolved the question whether corporations have a First Amendment right to engage in independent campaign-related issue advocacy. Petitioners are wrong, however, in stating that "the court of appeals' crucial holding is that a corporation does not have a right to make 'expenditures' for 'issue advocacy' unless it satisfies the three prongs of the '*MCFL* exemption.'" Pet. 13 (footnote omitted). Rather than holding that corporations generally lack such a right as a constitutional matter, the court of appeals made it entirely clear that it was reserving the question. See Pet. App. 8-9.

Petitioners are correct, however, in stating that corporations that satisfy the three *MCFL* criteria (see p. 3, *supra*) are constitutionally entitled to make independent disbursements for express advocacy as well as issue advocacy. Pet. 16-17; see 479 U.S. at 263-264. Insofar as the court of appeals' opinion suggests a narrower reading, see Pet. App. 7 (stating that *MCFL* "recognized a First Amendment right to issue advocacy" for

concluded that it need not determine the scope of the Maine Committee's constitutional right to engage in issue advocacy because it found the Commission's "written contact" and "equal prominence" requirements to be invalid on alternative grounds. See Pet. App. 9, 15-16; pp. 6-7, *supra*. Because this Court "reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)), petitioners' dissatisfaction with the court of appeals' mode of analysis provides no basis for invoking this Court's review.

2. Petitioners' only quarrel with the court of appeals' *judgment* is that the court remanded the case to the district court to determine whether the "electioneering message" restriction is severable from the rest of the Commission's voter guide regulation and, if so, whether the restriction is valid. Pet. App. 18. The court made clear, however, that it was remanding the case because it found the briefing on the "electioneering message" question to have been "perfunctory"; because it was uncertain how (if at all) the "electioneering message" standard differs from an "express advocacy" test; and because it did not believe the inseverability of the "electioneering message" restriction to be readily apparent. *Id.* at 17-18. The court of appeals' determination that further proceedings on this issue are appropriate raises no question warranting this Court's review.[4]

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corporations satisfying the stated criteria), we believe that the court was in error. As we explain in the text, however, any such error did not affect the court's *judgment*.

[4] Indeed, even where a court of appeals has definitively resolved a contested legal issue, this Court generally will deny

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1998

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certiorari if the case is in an interlocutory posture. See, *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). The unsuitability of the instant case for this Court's review is all the more apparent, since the court of appeals has simply held that the validity of the "electioneering message" restriction remains an open question.

Supreme Court, U.S.
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No. 97-786

In The

Supreme Court of the United States

October Term, 1997

ROBIN CLIFTON AND MAINE RIGHT TO LIFE COMMITTEE, INC.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. THE FEC AGREES WITH MRLC THAT THE COURT BELOW ERRED 3

II. CONTRARY TO THE FEC, THE COURT OF APPEALS ENTERED A FINAL JUDGMENT ON MRLC'S OVERBREADTH CLAIM. IN DIRECT CONTRAVENTION OF THIS COURT'S PRECEDENTS, THAT JUDGMENT PROHIBITS CORPORATIONS FROM ENGAGING IN ISSUE ADVOCACY 6

III. ALTHOUGH MRLC PREVAILED ON CHALLENGES TO TWO PROVISIONS OF THE REGULATION, ITS SPEECH IS STILL SEVERELY RESTRICTED BY THE PROVISIONS WHICH THE COURT BELOW UPHELD IN THE FACE OF MRLC'S OVERBREADTH CHALLENGE.... 8

IV. THIS CASE CONCERNS THE ABILITY OF REAL PEOPLE TO EXERCISE THEIR PRECIOUS RIGHT TO FREE SPEECH 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) .. 4, 9, 10

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 8

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

STATUTES AND REGULATIONS

2 U.S.C. § 441b 4

11 C.F.R. § 114.4(c)(5) 1, 2

INTRODUCTION

Petitioners Robin Clifton and Maine Right to Life Committee, Inc. (hereafter "MRLC") brought this suit to protect MRLC's right as a corporation to publish (and Clifton's right to receive) "voter guides" containing "issue advocacy." That right, though protected by this Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-249 (1986) ("*MCFL*"), is infringed by 11 C.F.R. § 114.4(c)(5) (effective March 13, 1996), a regulation promulgated by the Respondent Federal Election Commission (FEC). MRLC challenged the regulation on the bases of "overbreadth" and "vagueness."[1] Verified Complaint (V.C.) ¶ 52 *et seq.*

The district court invalidated the entire regulation due to its "overbreadth," but did not reach the "vagueness" claim. Petitioners' Appendix (Pet. App.) 77-78. Among the provisions which the district court invalidated on overbreadth grounds were those which prohibited corporations from publishing voter guides which contained "electioneering messages."

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[1] The distinction between "overbreadth" and "vagueness" is crucial to the instant controversy. MRLC's overbreadth claim is that the FEC's regulation prohibits more speech than is permissible under this Court's holding in *MCFL*, specifically, that it prohibits corporate "issue advocacy" whereas the constitutional limit of the FEC's statutory authority is the prohibition of corporate "express advocacy." V.C. ¶¶ 62-65. MRLC's (alternative) "vagueness" claim is that the regulation does not give adequate notice of what it prohibits and therefore would result in arbitrary and discriminatory enforcement, denying MRLC due process of law. V.C. ¶¶ 76-85.

Speaking of those provisions, the district court stated that

> [e]ven written contact with candidates results in *severe constraints on issue advocacy, id.* § 114.4(c)(5)(ii), otherwise entitled to broad protection under the teachings of *Buckley* and *MCFL*.

Pet. App. 71 (emphasis added).

The court of appeals "modified" the decision of the district court. The court of appeals held that

> the voter guide regulation, *id.* § 114.4(c)(5) is declared invalid *only insofar as* it limits any contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.

Pet. App. 18-19 (emphasis added). Thus, the court of appeals rejected the district court's holding that the "electioneering message" provisions were invalid due to overbreadth. It did so because of a misunderstanding of *MCFL*.

In *MCFL*, this Court held that corporate expenditures for issue advocacy constituted protected speech; the Court also held that corporations possessing certain features (the "*MCFL* features") had the additional right to make expenditures for "express advocacy." *MCFL*, 479 U.S. at 248-249 and 263-264. The court below mistakenly believed that MRLC did not have the right to engage in "issue advocacy" because it did not possess all of the *MCFL* features. Pet. App. 7-9. Therefore, it rejected the district court's invalidation of the "electioneering message" provisions (although it held two other provisions invalid for other reasons). Pet. App. 9-16.

Before the court of appeals' decision, MRLC and all other corporations unquestionably had the right to make expenditures for "issue advocacy" *regardless of whether they possessed the three MCFL features. MCFL*, 479 U.S. at 248-249. Such is the square holding of *MCFL*. *Id.* After (and as a direct result of) the court of appeals' decision, corporations which do not possess the *MCFL* features are *prohibited* from making issue advocacy expenditures which would qualify as "electioneering messages" – *despite the contrary holding of the MCFL Court*. The court of appeals has directly contradicted this Court's precedents, and, in the process, has effectively prohibited the exercise of a right (to engage in unrestricted issue advocacy) which MRLC undeniably possesses. And it has made that unlawful prohibition impervious to any remedy except this Court's review. Therein lies MRLC's grievance against the decision below and a sufficient reason for this Court to grant the Petition.

ARGUMENT

I. THE FEC AGREES WITH MRLC THAT THE COURT BELOW ERRED.

The FEC believes that the opinion of the court below was erroneous; inexplicably, the FEC nonetheless opposes granting MRLC's Petition (Pet.). As is demonstrated in the Petition (and as the FEC agrees), the court of appeals fundamentally misunderstood and contradicted this Court's analysis in *MCFL*. Pet. App. 17-20. In that case, this Court announced two distinct holdings: the first protected the "issue advocacy" of *all* corporations by

incorporating the "express advocacy" test of *Buckley v. Valeo*, 424 U.S. 1, 43-44 and n.52; 79-80 (1976) (*per curiam*) ("*Buckley*") against the prohibition of corporate expenditures in 2 U.S.C. § 441b; the second protected "express advocacy" expenditures of *only certain* corporations, *i.e.*, those which possessed the three "*MCFL* features."[2] As is also demonstrated in MRLC's Petition, the court of appeals' misreading of *MCFL* directly caused the error in its judgment, specifically, its reversal of the district court's holding that the "electioneering message" provisions of the FEC's regulation were invalid on the basis of overbreadth.[3] Pet. 20-23.

In this regard, the FEC has two quibbles with MRLC's argument. First, the FEC denies MRLC's assertion that the "express advocacy" standard is "constitutionally compelled." Brief for the Respondent in Opposition ("Resp. Br.") 9 n.3. This is a red herring: whether the narrowing construction imposed by the *MCFL* Court on § 441b is "constitutionally compelled" is, for present purposes, beside the point. To people who

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[2] Twice in its Brief for the Respondent in Opposition ("Resp. Br."), the FEC clearly demonstrates that it recognizes and understands the court of appeals' error. Resp. Br. at 3 and 9 n.3.

[3] As MRLC shows below, the court of appeals entered a final judgment, reversing the holding of the district court that the "electioneering message" provisions were infirm on "overbreadth" grounds. The court remanded to the district court not the broader question of whether the "electioneering message" are "valid," but *only* the narrower question of whether they survive MRLC's "vagueness" challenge. Pet. App. 16-19.

wish to exercise their right of free speech, it is inconsequential whether a decision which protects their freedom announces a "First Amendment right" or (in the FEC's phrase) a "construction of the statute which was clearly informed by constitutional concerns."[4] *Id.* It is a distinction without a practical difference. Whichever way it is characterized, this Court's decision in *MCFL* manifestly protects MRLC's right to make expenditures for issue advocacy without FEC interference. As the FEC concedes,

> even if a corporation does not qualify for the "*MCFL* exemption" . . . , Section 441b does not prohibit it from making independent disbursements for campaign-related speech, so long as that speech does not include 'express advocacy' of particular electoral results.

Id. Directly contrary to the above statement, the court of appeals' decision upheld the "electioneering message" prohibitions against MRLC's "express advocacy" challenge despite the fact that the court felt itself "entitled to assume that 'electioneering message' has a different, broader meaning" than "express advocacy." Pet. App. 17.

Second, the FEC contends that the court of appeals' opinion can be read broadly as having "reserved" rather than having decided "the question whether corporations have a First Amendment right to engage in independent campaign-related issue advocacy." Resp. Br. 9 n.3. But the court below may not purport to "reserve" judgment on

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[4] However, suppose for the sake of argument that the FEC is right, and this Court has *not* squarely held that the express advocacy test is constitutionally compelled and that this would make a difference in determining the legitimacy of the court of appeals' opinion. If so, that constitutes an additional reason *in favor of* granting the petition, not an argument against review.

an issue that has already been decided by this Court. Again, whether or not it is characterized as "constitutionally compelled," the holding of *MCFL* is clear: corporate expenditures for issue advocacy may not be prohibited. This Court has decided the issue; it may not be revised by an inferior court.

Thus, the decision below does not suffer from "imprecision," as the FEC suggests: rather, it is flat wrong. Resp. Br. 9. As MRLC has shown, it conflates two holdings of *MCFL* into one which, beyond cavil, misunderstands and contradicts one of the central speech-protective holdings of *MCFL*. Thus, the FEC's attempts to resuscitate the court of appeals' holding through an indulgent interpretation are unavailing. In sum, the parties agree on the fundamental fact that the court of appeals misread this Court's precedents, notwithstanding the FEC's attempts to mitigate this mistake by giving a niggardly reading to *MCFL* and a charitable reading to the opinion of the court below.

II. CONTRARY TO THE FEC, THE COURT OF APPEALS ENTERED A FINAL JUDGMENT ON MRLC'S OVERBREADTH CLAIM. IN DIRECT CONTRAVENTION OF THIS COURT'S PRECEDENTS, THAT JUDGMENT PROHIBITS CORPORATIONS FROM ENGAGING IN ISSUE ADVOCACY.

As demonstrated above, a fair reading of the FEC's Brief shows that the FEC substantially agrees with MRLC that the analysis of the court below was erroneous. But the FEC attempts to distinguish between the court's analytical errors and its *judgment*, as if the two were unrelated. Resp. Br. 10.

The decision below on the "electioneering message" provisions was not *interlocutory* as the FEC contends. Rather, the court of appeals finally determined the issue of whether those requirements were beyond the statutory authority of the FEC (*i.e.*, whether they suffered from "overbreadth" under *MCFL*). This holding stemmed directly from the court of appeals' faulty premise. It was precisely because the court of appeals began with the false assumption that *MCFL* protects the issue advocacy of only corporations with the *MCFL* features (coupled with the fact that MRLC does not possess one of those features) that the court sought alternate grounds for resolving the case. It found that two other provisions could be resolved on such alternate grounds, but (apparently) that the "electioneering message" provision could not be determined on either of those bases.

As explained in the Petition, MRLC challenged the entire regulation on overbreadth grounds, and the district court had held the entire regulation (including the "electioneering message" provisions) invalid on that basis. Pet. 11 n.13; V.C. ¶¶ 62-63. But the court of appeals, due to its profound misunderstanding of the holding in *MCFL*, ruled against MRLC on its overbreadth claim with respect to those provisions. Thus, the court of appeals' decision constituted a reversal of the trial court's holding that those provisions were invalid on overbreadth grounds. Although the opinion does not explicitly so state, the conclusion that the court of appeals upheld the "electioneering message" provisions as against MRLC's overbreadth challenge is inescapable. The opinion clearly indicates that the court did not remand the case for a consideration of MRLC's overbreadth claim, but only for

a determination of whether the "electioneering message" provisions were unconstitutionally *vague*., Pet App. 16-19. Upon remand, therefore, the district court is limited under the "law of the case doctrine" as to the extent of relief that it may grant. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). It may determine only whether the electioneering message provisions are vague, not whether they are overbroad. Although it could conceivably invalidate the provisions on vagueness grounds, it might not. If it does not, the holding that they are not invalid for overbreadth will be the law of the case. MRLC will then be foreclosed from re-litigating that issue until the case wends its way back to this Court. This result obtains *despite the fact that the court which upheld the challenged provisions did so in direct contravention of this Court's precedents*. In the meantime – including the federal election year of 1998 – corporations such as MRLC will be prohibited from publishing voter guides containing issue advocacy.

III. ALTHOUGH MRLC PREVAILED ON CHALLENGES TO TWO PROVISIONS OF THE REGULATION, ITS SPEECH IS STILL SEVERELY RESTRICTED BY THE PROVISIONS WHICH THE COURT BELOW UPHELD IN THE FACE OF MRLC'S OVERBREADTH CHALLENGE.

The FEC states that MRLC "substantially" prevailed in this case since the court of appeals struck down two out of three provisions of the challenged regulation. Resp. Br. 8. The tacit suggestion is that MRLC ought to be happy that its speech is only prohibited by one provision rather than by three. But what comfort can MRLC take in

the fact that it may not now be required to contact candidates only in writing, or that it may not now be required to give equal space and prominence to candidates listed in its voter guides, when, as a result of the same judicial decision, it *may* be required to limit its voter guides in another way which is every bit as onerous? The end result for MRLC (and for all corporations) is the same: its members cannot go forward with the speech they had intended to make unless they are willing to submit to the FEC's "electioneering message" restriction – a restriction which, because it is overbroad (*i.e.*, prohibits a substantial amount of protected speech), directly violates this Court's speech-protective jurisprudence. Thus, speech about candidate's and political issues which would have been contained in MRLC's voter guides – the very speech this Court has said is entitled to the "broadest protection" because it is a bulwark of representative democracy – will be stifled, and MRLC's central educational purpose will be frustrated. *Buckley*, 424 U.S. at 14 and 49 n.55; V.C. ¶ 9.

IV. THIS CASE CONCERNS THE ABILITY OF REAL PEOPLE TO EXERCISE THEIR PRECIOUS RIGHT TO FREE SPEECH.

Behind the facade of technical terminology, behind "express advocacy" and "issue advocacy," behind "electioneering messages," "overbreadth" and "vagueness," this case is really only about the right of citizens to speak their minds on political issues. It is about real people who have established an association in corporate form in order to communicate about candidates and issues in the context of federal elections. They are not unique in this respect; rather, theirs is but one of countless corporate

associations representing all points on the spectrum of political belief and formed for the purpose of "amplifying the voice of their adherents." *Buckley*, 424 U.S. at 22. These citizens' groups – however diverse their political views – have this in common: they want to exercise their right to political speech free from governmental interference.

The court below, however, by directly contradicting this Court's speech-protective precedents, will have succeeded in confining the speech of all such corporate issue-oriented groups within highly restrictive boundaries during the upcoming election year, the very time when such speech is most crucial. In upholding the "electioneering message" provisions of the FEC's regulation against MRLC's overbreadth challenge, it has significantly diminished the "breathing space" which this Court recognizes as vital to the exercise of free speech. *Id.* at 41 n.48.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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